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In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

v.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 71 C 1414

ALBERTO-CULVER COMPANY,

Plaintiff,

v.

FRITZ SCHERK,

Defendant.

RELEVANT DOCKET ENTRIES

1971

June 11. Filed complaint with exhibits attached . . . .

Aug. 31. Filed defendant's motion to dismiss or alternatively to stay.

Nov. 22. Filed motion for preliminary injunction restraining prosecution of arbitration.

Nov. 24. Enter order of preliminary injunction enjoining the defendant Fritz Scherk from further prosecuting the arbitration proceeding before the Court of Arbitration of the International Chamber of Commerce pending decision of this Court as to its jurisdiction-DRAFT-Order Plaintiff's bond set at $5,000.00—Lynch, J.

Dec. 22. Enter order denying defendant's motion to dismiss or alternatively to stay—Lynch, J.

1972

Jan. 7. Filed defendant's motion to amend order of December 22, 1971.

Jan. 12. Plaintiff motion for renewed preliminary injunction is entered and continued; defendant is given five days to reply—Lynch, J.

Relevant Docket Entries

Jan. 14. Enter order granting defendant's motion for certification to the Circuit Court of Appeals pursuant to 28 U.S.C. sec. 1292(b). Enter order of preliminary injunction pursuant to the terms of the draft order entered herein (Draft). Enter order approving preliminary injunction bond in the amount of $7,500.00 (Draft)—Lynch, J.

Jan. 14. Enter order granting defendant's motion for certification to court of appeals. Enter injunction enjoining the parties from proceeding—Lynch, J.

Jan. 17. Filed memorandum of decision.

Jan. 18. Enter amended order (Draft)—Lynch, J.

Jan. 21. Filed defendant's notice of appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALBERTO-CULVER COMPANY,

Plaintiff-Appellee,

v.

FRITZ SCHERK,

Defendant-Appellant.

RELEVANT DOCKET ENTRIES

1972

Mar. 1. Filed original record on appeal.

1973

Aug. 2. Entered judgment order AFFIRMING, with costs. Opinion by Judge Gordon. Judge Stevens dissenting.

Aug. 16. Filed 25 copies of petition for rehearing and suggestion for rehearing en banc—service.

Oct. 18. Entered order denying petition for rehearing.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.
(Title omitted in printing.)

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, RESCISSION AND OTHER RELIEF

(Filed June 11, 1971.)

The plaintiff, Alberto-Culver Company, for its Complaint against defendant Fritz Scherk, alleges that:

COUNT I

1. The plaintiff pleads this Count I to enforce liabilities created by Section 10 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78j, and rule 10b-5 promulgated thereunder. The Court's jurisdiction is based upon Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa.

2. Certain of the acts and transactions constituting the violations complained of herein have occurred within the jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division.

3. Prior to March 15, 1969 the defendant Scherk owned all of the outstanding securities of a Liechtenstein corporation, Scherk Enterprises V. Aktiengesellshaft (formerly known as Scherk Establissement Vaduz and hereinafter called "SEV") and all outstanding securities of a German corporation, Lodeva Herstellung und Vertrieb

Kosmetischer Artikel GMBH (hereinafter called "Lodeva"). Scherk was also the sole proprietor of a business called Firma Ludwig Scherk (hereinafter called "FLS"), located in Berlin, Germany.

4. Between July 1, 1967 and March 15, 1969 the plaintiff and the defendant engaged in extensive negotiations in Illinois and elsewhere for the acquisition by plaintiff from defendant of all of the outstanding securities of SEV and of Lodeva and all of the assets, with certain specified exceptions, of FLS, including trademarks purportedly owned by the defendant and the acquired businesses. On or about February 11, 1969 and February 12, 1969, as a result of these negotiations, the plaintiff and the defendant entered into and executed four (4) written agreements as follows:

(a) An Agreement for the acquisition by plaintiff from defendant of all the outstanding securities of SEV.

(b) An Agreement for the acquisition by plaintiff from defendant of all of the defendant's outstanding securities of Lodeva.

(c) An Agreement for the acquisition by plaintiff from defendant of all of the assets, with certain specified exceptions, of FLS.

(d) A Consulting Agreement, ancillary to the other three Agreements, under which defendant undertook for an agreed consideration to render services to plaintiff and to refrain from competition with plaintiff under specified conditions.

Copies of the four Agreements (hereinafter collectively referred to as "the Agreements") are attached hereto as Exhibits 1 through 4, respectively.

5. During the course of the negotiations leading to the execution of the Agreements and in connection with the purchase by the plaintiff of all of the outstanding securi-

ties of SEV and of Lodeva and the assets of FLS the defendant and his authorized agents by the use of the means or instrumentalities of interstate commerce or of the mails, including interstate telephone calls, telegrams and travel into Illinois, employed devices, schemes or artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, and engaged in acts, practices or courses of business which operated as a fraud or deceit upon the plaintiff.

6. As part of the devices, schemes or artifices to defraud, the untrue statements and omissions of material fact, and the acts, practices and courses of business which operated as a fraud or deceit, the defendant and his authorized agents with the intent to induce plaintiff to act thereon and with the intent to deceive and defraud made representations concerning the character, nature, validity and value of trademarks purportedly owned by defendant and the acquired businesses notwithstanding that they knew or should have known that the representations were false and misleading.

7. The false and misleading representations made by the defendant and his authorized agents included the following:

(a) On or about November 15, 1968 the defendant's American attorney, who was expressly authorized by defendant to represent defendant in the negotiations, sent to counsel for the plaintiff in Chicago a telegram stating that with respect to certain trademarks "owned by omission SEV omission SEV omission will have good and merchantable title to all such registrations and to the best of their knowledge information and belief all such marks free and clear of

any charges or claims no actions omission pending anain st ill (sic) threatened with respect to said titles to any such marks all registrations stop rest O.K. stop omissions."

(b) On or about November 26, 1968 the defendant's American attorney, in a letter sent to plaintiff's counsel in Chicago, stated that "we would of course be willing to add what I mentioned this afternoon, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark rights of Scherk's."

(c) On or about December 8, 1968 the defendant's American attorney, during the course of negotiations in Chicago, Illinois, stated to plaintiff's Vice President and to plaintiff's trademark counsel that he had checked with those persons connected with defendant who were familiar with the trademarks and had ascertained that with respect to the trademarks there were no restrictive agreements and no opposition or legal proceedings or litigation, either past, pending or threatened.

(d) Both the FLS and SEV Agreements contain the following representations and express warranties:

"3.6(d) Seller warrants that he has full exclusive and unencumbered title in and to all national and international trademark registrations set forth in Exhibit TM-3, and that said national registrations are presently in full force and effect in the countries to which they pertain, and that said international registrations are presently in full force and effect in all countries (except countries included in Group W) adhering to the Arrangement of Madrid for the Inter-

national Registration of Trademarks, as amended, except to the extent, if any, shown on the BIRPPI status reports set forth in Exhibit TM-X and that subject to the agreements with Tarsia GMBH set forth in Exhibits TM-3A, TM-3B, TM-3C, TM-3D and TM-3E he has full exclusive and unencumbered title to the trademarks SCHERK, TARR, LARA, FJORD and variants thereof in those of the following countries in which as shown in Exhibit TM-3 said trademarks are respectively registered: Austria, Finland, Germany, Greece, Holland, Italy, Liechtenstein, Switzerland, Turkey and the United Kingdom.

(e) With respect to the countries referred to in Exhibits TM-1A, TM-1B, TM-2 and TM-3 (hereinafter referred to as "Group F" countries), Seller warrants that there are no legal or administrative actions or other adverse claims pending or to his knowledge threatened against any of the trademarks or pending applications or registrations set forth in said Exhibits, except as noted in Exhibit TM-4. Seller further warrants that there are presently pending no legal or administrative actions or asserted claims against any third parties based upon his rights in any of the trademarks or pending applications or registrations set forth in said Exhibits except as noted in Exhibit TM-4(1).

(h) Seller warrants in and for those Group F countries requiring actual use of a trademark within prescribed periods subsequent to its registration (hereinafter referred to as POST USER COUNTRIES), that the trademarks SCHERK, TARR, LARA and FJORD and variants thereof have been in fact duly and lawfully used in said POST USER COUNTRIES during the respective prescribed statutory periods .... except as to those trademarks in those countries set forth in Exhibit TM-5."

(e) At no time during the negotiations in Illinois and elsewhere did the defendant disclose that the character, nature, validity and value of the trade-

marks were impaired by numerous defects, including restrictive agreements between defendant and third parties, numerous past and pending legal proceedings affecting the trademarks brought both by and against the defendant, and his failure to use the trademarks in countries requiring actual use within a prescribed statutory period, although such disclosures were necessary in order to make the statements by the defendant, in light of the circumstances under which they were made, not misleading. Some of these defects are set forth in detail in the letter dated April 6, 1970, to plaintiff from the law firm of Pattishall, McAuliffe & Hofstetter attached hereto as Exhibit 5. Each of these defects was known to the defendant and his agents at the time of representations and express warranties were made.

8. All of the above representations and express warranties were material to plaintiff. Relying on the representations and express warranties and believing them to be true, plaintiff purchased from the defendant all of the outstanding securities of SEV and of Lodeva and the assets of FLS, executed the Agreements in Illinois and paid to defendant thereunder in excess of $615,000. Under the SEV Agreement plaintiff also executed in Illinois and delivered to defendant promissory notes (hereinafter called "the Notes") in the aggregate principal amount of $800,000 and prescribing the payment of interest and principal at intervals specified in the Notes.

9. An actual controversy exists between the parties. After discovery of the fraudulent representations and omissions plaintiff notified defendant thereof and further informed defendant that, by reason of such fraudulent representations and omissions, plaintiff notified defendant

that plaintiff was rescinding the Agreements. On numerous occasions plaintiff has demanded that defendant proceed with the rescission of the Agreements and make plaintiff whole for all sums paid and losses incurred by plaintiff as a result of defendant's fraudulent representations, omissions and breaches of warranty.

10. Although defendant has stated, in correspondence and in meetings in Chicago, Illinois, that the Agreements should be rescinded, defendant has wholly failed and refused to pay to plaintiff those sums necessary to make plaintiff whole but has, on the contrary, unreasonably and vexatiously withheld such payment, and has stated that he is without sufficient funds to make such payment, thereby compelling plaintiff to continue to advance additional capital to the SEV, Lodeva and FLS businesses in order to maintain them as viable entities.

11. In addition to the more than $615,000 paid to defendant under the Agreements, plaintiff has sustained losses and incurred expenses in the sum of One Million Two Hundred Thousand Dollars ($1,200,000) in connection with the Agreements and in discovery of the defendant's fraud and breaches of warranty, including advances of capital to SEV, Lodeva and FLS, interest, travel expense, legal and accounting fees, and services of company personnel.

12. Plaintiff stands ready to retransfer to defendant the properties acquired by plaintiff upon payment by defendant of those sums necessary to make plaintiff whole.

13. The FLS, SEV and Consulting Agreements contain a provision purporting to require resort to arbitration before the International Chamber of Commerce with respect to any controversy or claim which shall arise out

of such Agreements or the breach thereof. Defendant has threatened to institute such arbitration proceedings or other litigation against plaintiff.

Wherefore, plaintiff prays that the Court:

1. Enter a declaratory judgment declaring the Agreements and each of them, and all agreements ancillary thereto and connected therewith, rescinded and cancelled and relieving plaintiff of all further obligation thereunder.

2. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

3. Enter judgment against the defendant in the amount of One Million Eight Hundred Fifteen Thousand and no/100 Dollars ($1,815,000.00) as compensatory damages.

4. Enter judgment against the defendant in the further amount of Two Hundred Thousand and no/100 Dollars ($200,000.00) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

5. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

6. Require the defendant to pay all costs incurred in these proceedings and in connection with any retransfer of property or implementation of the rescission.

7. Grant such other or further relief as may be appropriate.

COUNT II

1. The plaintiff pleads this Count II to enforce common law liability for fraud and deceit and for breach of express warranties.

2. The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware and has its principal place of business in the State of Illinois.

3. The defendant Fritz Scherk is a citizen of either Germany or Switzerland and resides in Geneva, Switzerland.

4. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs. The Court's jurisdiction of the matter complained of in this Court is therefore based on 28 U.S.C. §1332 as well as the principles of pendent jurisdiction.

5. The plaintiff realleges paragraphs 1 through 8 of Count I as though fully set forth herein.

6. During the course of the negotiations leading to the execution of the Agreements and in the Agreements themselves the defendant Scherk and his authorized agents, in the State of Illinois and elsewhere, made false and fraudulent representations of material fact and false and fraudulent express warranties to the plaintiff concerning the character, nature, validity and value of trademarks purportedly owned by defendant. Such representations and warranties were made by defendant and his agents with knowledge of their falsity and with the intent to induce plaintiff to act thereon and with the intent to deceive and defraud the plaintiff. Relying on the false and fraudulent representations of material fact and the false and fraudulent express warranties and believing them to be true, the plaintiff purchased from the defendant all of the outstanding securities of SEV and of Lodeva and the assets of FLS, executed the Agreements and paid to defendant thereunder in excess of $615,000. Under the SEV Agreement plaintiff also executed and delivered to defendant

promissory notes (hereinafter called "the Notes") in the aggregate principal amount of $800,000 and prescribing the payment of interest and principal at intervals specified in the Notes.

7. The plaintiff realleges paragraphs 9 through 13 of Count I as though fully set forth herein.

Wherefore, plaintiff prays that the Court:

1. Enter a declaratory judgment declaring the Agreements and each of them, and all agreements ancillary thereto or connected therewith, rescinded and cancelled and relieving plaintiff of all further obligation thereunder.

2. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

3. Enter judgment against the defendant in the amount of One Million Eight Hundred Fifteen Thousand and no/100 Dollars ($1,815,000.00) as compensatory damages.

4. Enter judgment against the defendant in the further amount of Two Hundred Thousand and no/100 Dollars ($200,000.00) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

5. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

6. Require the defendant to pay all costs incurred in these proceedings and in connection with any retransfer of property or implementation of the rescission.

7. Grant such other or further relief as may be appropriate.

COUNT III

1. The plaintiff adopts and realleges paragraphs 1 through 8 of Count I and paragraphs 1 through 7 of Count II as though fully set forth herein.

2. Plaintiff pleads this Count III as an alternative claim in the event that the Court finds that the rescission and other relief requested in Counts I and II are for any reason unavailable.

3. The difference between the character, nature, validity and value of the trademarks as represented and warranted and the character, nature, validity and value of the trademarks as they in fact were discovered to be is so substantial and so material as to result in a total failure of consideration with respect to such trademarks. As a proximate result of the defendant's false and misleading statements and omissions and the false and fraudulent representations of material fact and false and fraudulent express warranties the plaintiff has sustained loss and damage in an amount not less than One Million Three Hundred Thousand Dollars ($1,300,000) through such impairment of the trademarks and additional damages in the amount of not less than Three Hundred Thousand Dollars ($300,000) in (a) investigating and discovering defendant's fraud and breaches of warranty, (b) legal and other costs incident to the defense and prosecution of the legal proceedings affecting the trademarks, (c) lost profits of FLS and SEV, (d) obsolete inventory and uncollectible accounts receivable which defendant warranted in the Agreements to be saleable and collectible, and (e) defendant's improper withdrawals of funds from the businesses.

Wherefore, plaintiff prays that the Court, as an alternative to the relief prayed for in Count I:

1. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

2. Enter judgment against the defendant in the amount of Eight Hundred Thousand Dollars ($800,000) as compensatory damages.

3. Enter judgment against the defendant in the further amount of Two Hundred Thousand Dollars ($200,000) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

4. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

5. Grant such other or further relief as may be appropriate.

Alberto-Culver Company, a
Delaware corporation,
Plaintiff

By /s/ *A. Charles Lawrence*
A. Charles Lawrence
/s/ *C. Curtis Everett*
C. Curtis Everett
/s/ *Francis J. Higgins*
Francis J. Higgins
Its Attorneys

Of Counsel:
Lawrence, Goldberg, Lawrence & Lewin
209 South LaSalle Street
Chicago, Illinois 60604
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131

EXHIBIT 1 TO COMPLAINT

AGREEMENT

This Agreement is made as of this 12th day of February, 1969 between Fritz Scherk, residing at La Residence Veyrnier, Saleve, Geneva, Switzerland (hereinafter called "the Seller"), and Alberto-Culver Company, a Delaware corporation (hereinafter called "AC").

The parties hereto agree as follows:

ARTICLE I

Section 1.1

In consideration of the amount of DM 100, receipt of which is hereby acknowledged by the Seller, the Seller grants to AC an irrevocable option, exercisable as provided in Section 1.1.1, to purchase from the Seller at the time of closing, as defined in Section 1.5, on the basis of the representations and warranties and subject to the terms and conditions set forth in this agreement and for the total purchase price specified in Section 1.2, the following:

All issued and outstanding shares of stock of a new Liechtenstein corporation (hereinafter called "AG") to be formed by Seller, in accordance with Section 1.4. AG shall own all assets, except as specifically excluded in this section, and the liabilities set forth in this section, of Scherk Etablissement Vaduz, a Liechtenstein establishment, (hereinafter called "SEV"), as of the date of the transformation described in Section 1.4. The assets owned by SEV and to be owned by AG include without limitation cash, accounts receivable, inventories, prepaid expenses, office furniture and equipment, amounts due from affiliated

companies, a hundred (100) per cent interest in Scherk Ges. GMBH, an Austrian corporation, (hereinafter called "GMBH"); the business of SEV as a going concern, goodwill, trademarks, trade names (including but not limited to the name "Scherk"), designs, copyrights, patents, applications, licenses, processes, formulae, trade secrets, inventions and similar rights owned or controlled by SEV, and all trademarks, trade names, their registrations and the goodwill of Scherk Ltd., a United Kingdom corporation, wholly-owned by Seller (hereinafter called "UK"). The assets exclude the shares of (a) UK, (b) Scherk Perfumery Ltd., an Israel corporation, (c) Lysia S.A. and Semic S.A., Spanish corporations, owned by SEV or Seller on the date of this agreement, and (d) all trademark registrations in Israel (for use only in Israel) and the use in Israel (but only in Israel) of the tradename "Scherk".

• • •

Section 1.1.1

The irrevocable option refererd to in Section 1.1 may be exercised by AC at any time after the date hereof and before February 25, 1969 by giving written notice of exercise to the Seller, c/o Messrs. Kaye, Scholer, Fierman, Hays and Handler, 425 Park Avenue, New York, New York 10022. If such notice is not given within the aforesaid period, said option shall expire at the close of business on February 25, 1969. If such notice is given within said period, the Seller shall be obligated to sell, and AC shall be obligated to purchase all the shares of AG on and subject to the terms and conditions set forth in this agreement.

Exhibit 1 to Complaint

Section 1.2

The purchase price to be paid by AC for all issued and outstanding shares of AG shall be the amount of DM 8,200,000, subject to increase or reduction as hereinafter set forth, and payable as follows:

• • •

Section 1.3

In order to secure the performance of the irrevocable option referred to in Section 1.1, Seller shall on the date of the closing of another agreement dated February 11, 1969 between AC and Seller (hereinafter referred to as the "other agreement"), irrevocably assign to the Praesidial-Anstalt, a Liechtenstein establishment (hereinafter called "Escrow Agent"), all his rights as founder and owner of SEV to enable the Escrow Agent to effect the transformation of SEV into AG as provided in Section 1.4 of this agreement and to take all other actions to enable the Escrow Agent to comply with this agreement and the annexed Escrow Agreement. At the same time Seller shall deliver to the Escrow Agent such other instruments, including stock powers endorsed in blank for the shares of AG, revocations of existing powers of attorney and resignations of directors as may reasonably be requested by AC or the Escrow Agent. Seller warrants that he owns and has clear title to 100% of SEV, that his rights to SEV are free and clear of liens and encumbrances, that no other persons have any ownership rights or any right to acquire an ownership interest with respect to SEV and that he has the exclusive right and power to assign such rights as contemplated by this Section 1.3.

Section 1.4

Not later than February 28, 1969, Seller and the Escrow Agent shall have caused SEV to be transformed (umgewandelt) into AG in accordance with the following

terms and conditions and the terms and conditions of the annexed escrow agreement:

(a) All actions and documents in connection with such transformation shall be communicated to and be satisfactory to AC.

(b) The name of AG shall be Scherk Enterprises V. A.G., or a similar name satisfactory to AC.

(c) AG shall have an authorized and issued capital of 10,000 common shares, par value SFr 5 per share. The certificate for said shares shall be registered in the name of Seller.

(d) Seller shall take all steps necessary to cause AG to have good and merchantable title to all assets of SEV pursuant to Section 1.1, including all shares of GMBH, all trademarks, applications and registrations contained on the lists referred to in sub-section 3.6(a) (including the goodwill of the business pertaining thereto and the right to recover for past infringement), of SEV and UK within or outside of Liechtenstein, and all rights of SEV under all its existing agreements with others. Seller, SEV, GMBH and UK will take all necessary actions to perfect good title, to the extent warranted to be held by SEV, GMBH or UK pursuant to Section 3.6, in AG and GMBH in and to all applications, registrations and trademarks set forth in Exhibits TM-1B, TM-2 and TM-3 respectively and to any subsequently discovered registered trademarks and pending applications.

(e) All expenses, including taxes and legal fees, in connection with the transformation and the actions required to be taken in connection therewith shall be borne by Seller.

• • •

Exhibit 1 to Complaint

Section 3.12

All of the representations and warranties hereinabove contained in this Article will be true and correct at and as of the time of closing with the same force and effect as though made at and as of the time of closing, except for changes contemplated or permitted by this agreement.

• • •

Section 9.4

The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

• • •

EXHIBIT 3 TO COMPLAINT

AGREEMENT

This Agreement is made as of the 11th day of February, 1969, between Fritz Scherk, residing at La Residence Veyrnier, Saleve, Geneva, Switzerland (hereinafter called the "Seller"), and Alberto-Culver Company, a Delaware corporation (hereinafter called "AC").

Whereas, the Seller desires to sell to AC and AC desires to buy from the Seller, the assets of the Seller hereinafter described, upon the terms and conditions set forth below.

Now, Therefore, the parties hereto agree as follows:

• • •

Section 9.4

The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

• • •

Exhibit 5 to Complaint

EXHIBIT 5 TO COMPLAINT

(Letterhead of Pattishall, McAuliffe & Hofstetter, Prudential Plaza, Chicago, Illinois 60601)

April 6, 1970

Robert D. Silver, Esq.
Alberto-Culver Company
2525 West Armitage Avenue
Melrose Park, Illinois 60160

Scherk Acquisition

Dear Bob:

As you know, during the period from the end of November, 1969, when possible breaches of the trademark warranties in the FLS and SEV acquisition agreements were first called to your attention, up to the present date, we have worked both here and in Germany in conjunction with you and your Legal Department in a painstaking review of the above. Mr. John Andrew of our office has just returned from a ten-day trip to Berlin and Munich, where he met with Messrs. Quack and Staeger, as well as Alberto-Culver personnel, seeking to obtain a complete picture of what is involved. His study of the files, records and various relevant materials discloses breaches of the warranties contained in Sections 3.6(a) (unencumbered title), 3.6(e) (no pending legal or administrative actions, and 3.6(h) (use of marks where required by law). His examination also reveals that many of the matters involved had received the personal attention of Mr. Scherk and of Mr. Navon and Mr. Marks who were Mr. Scherk's representatives in the negotiations with Alberto-Culver.

Mr. Andrew has found that title to the trademarks acquired from FLS and SEV is encumbered by more than

fifty agreements with third parties respecting the use and registration of Scherk marks or of third party marks, the registration of which has been opposed by Scherk.

Among the agreements found are three with Norddeutsch Woll — und Kammgarn-Industrie A.G., Alwin M. Bach and C. F. Asche & Co., A.G., dated August 2, August 30 and September 3, 1940, respectively, in which Scherk's predecessor agreed to limit its use of the trademark LARA to "facial water". We understand that the agreement with Asche was brought to the attention of FLS by Asche in the early 1960's and a copy of the agreement was sent by Mr. Staeger to FLS on June 27, 1962. Similarly, the Norddeutsche agreement is referred to in a letter from Mrs. Haas of FLS to Mr. Staeger dated February 9, 1965 and initialled by Mr. Fritz Scherk, a copy of which is enclosed. In 1953 and 1954 FLS entered into a series of four additional agreements with the Hoffman-LaRoche, Boehringer, Henkel & Cie. and Jura firms in which FLS agreed to use its registration of LARA in the pharmaceutical class, German Registration No. 663,861, only as a defensive mark. These agreements restricting use of LARA extend significantly beyond the partial refusal of protection in Germany for the SEV international registration of LARA, No. 186,814, which left the mark free for use on "perfume products in general, cosmetics, soaps and hygienic products".

Other significant agreements found by Mr. Andrew include:

1) A 1965 agreement with Colgate-Palmolive settling oppositions based on Scherk's ACTION and GO GO marks and permitting Colgate-Palmolive to use its marks ACTION GO on laundry products;

2) a 1962 agreement with Helene Curtis settling an opposition brought by Scherk based on GO GO by permitting Curtis to use GO GAY on hair spray;
3) a 1943 agreement with Dr. Janssen, a German firm, permitting it to use JARA on toothpaste;
4) an agreement dated October 28, 1968, signed by Fritz Scherk, with the French firm Pechiney-Progril S.A., prohibiting the use of SEV's GO GO for chemical products for agriculture and gardening;
5) a 1958 letter agreement with the Swiss firm Dr. A. Wanger agreeing never to use TAOS in France, Italy and Switzerland where Dr. A. Wander apparently uses TAO for a suntan preparation;
6) an agreement with Wella dated May 3, 1962, ending an opposition based on TRISENA and permitting Wella's registration of FRISINA for hair care products; and
7) an agreement with Badische signed by Fritz Scherk on April 24, 1968, in which SEV agreed never to use ACTION for medicines, insecticides and herbicides.

Copies of those agreements found in the Scherk files which have not previously been delivered to you are enclosed, together with a list of those agreements which, from reference in the files, Mr. Andrew determined to have come to the attention of Scherk or Navon.

With respect to pending legal and administrative actions, we find, as previously reported, a large number of pending opposition actions brought by FLS and SEV against third parties. The files reveal to Mr. Andrew that the pendency of many of these opposition actions were known to Messrs. Scherk and Navon. Mr. Andrew has

noted, for example, that late in October 1968 Mr. Navon personally authorized the filing of an opposition action in Spain based on FLS's registration of LA PATINE. Lists of such pending FLS and SEV matters bearing notations as to the dates of letters concerning them seen by Messrs. Scherk and Navon are enclosed.

The files also reveal that during the period of intensive negotiations in 1968, Scherk had agreed to Bristol-Myers' request that it cancel its British registration of the trademark OBREY. The January 10, 1969 letter from the A. A. Thornton firm in London to FLS confirming that the cancellation had been completed and stating that it had been done "in accordance with the arrangement made with the Bristol-Myers Company" was initialled by Mr. Navon. A copy of the letter was sent by Thornton to Mr. Marks.

Two court proceedings involving Scherk marks have also come to our attention. In one, involving the Brautigam firm, the German Federal Patent Court held that Scherk's LARA and Brautigam's ARYA-LAYA are confusingly similar. Since Brautigam has prior rights, this decision could result in cancellation of the German LARA registrations, although a settlement may yet be negotiated. Mr. Andrew has noted from the file that Messrs. Scherk and Navon were familiar with this case in the fall of 1968.

The second series of cases which has come to light involves Scherk's mark RENAISSANCE. This began as an unfair competition action against Revlon's use of the mark in a descriptive sense in advertising. Of particular importance is the counter-action brought by Revlon against SEV in the German Patent Office, seeking cancellation of SEV's German extension of its international registration of RENAISSANCE on the ground that SEV is merely a paper company without a legitimate business.

Exhibit 5 to Complaint

International trademark registrations, under the Madrid Arrangement, must be based upon registration in the country of origin. "Country of origin" is defined in Article 1(3) of the Convention as the country where the owner of the mark has "a real and effective industrial or commercial establishment" or where he is domiciled.

Although we understand that steps have been taken since the beginning of the Revlon proceeding to make sales of Scherk products through Liechtenstein, there appears to be a serious continuing question as to whether SEV has "a real and effective industrial or commercial establishment" in that country.

A general settlement of the pending matters has been negotiated with Revlon, which Mr. Staeger recommends be accepted in order to avoid a ruling on the point raised by Revlon. There remains the possibility that the Patent Office, despite the settlement, would rule on the matter *ex parte* adversely to SEV.

The point raised by Revlon in the SEV RENAISSANCE cancellation proceeding affects, of course, all the SEV International registrations which have been extended to Germany. As a matter of non-binding precedent and of comity, an adverse opinion could be damaging in other countries belonging to the Madrid Arrangement.

Mr. Andrew was informed by Mr. Staeger that Mr. Scherk worked closely with him on the RENAISSANCE matters. Mr. Staeger has also informed Mr. Andrew that when Mr. Marks visited him in Munich in 1968 he informed Mr. Marks of the pendency of the RENAISSANCE cases and stressed that they presented a serious problem.

With respect to Section 3.6(h), it appears to Mr. Andrew that despite the warranty to the contrary, the mark LARA had not been used within the prescribed statutory

period in certain countries requiring use of a trademark, and that this may also be true of other marks. Such non-use would be especially harmful in Liechtenstein, where it could provide a vehicle for attack on the home registrations supporting SEV's international registrations.

* * * [sic]

In summary, investigation has revealed that the trademark portfolio which Alberto-Culver has obtained from Scherk is heavily encumbered by agreements and pending matters which should have been called to Alberto-Culver's attention and listed in the exhibits to the warranties but were not.

It is clear that Mr. Scherk and his agents knew the great value Alberto-Culver placed on the unencumbered trademark rights which it thought it was obtaining from Scherk. During the negotiations on January 24, 1969, we understand that Mr. Navon, the principal negotiator for Scherk, advised Alberto-Culver that Proctor & Gamble had agreed to pay Scherk DM 30,000 for the right to use the mark TAG, which is similar to Scherk's TAR and TAO, in Denmark, and DM 200,000 for the same rights throughout Western Europe. We also understand that Mr. Scherk was well aware from his meetings with Mr. Lavin of the importance which Alberto-Culver attaches to good unencumbered trademark rights. We are informed that Mr. Marks was repeatedly advised to the same effect.

We understand, and are personally aware, that it was repeatedly made clear to the negotiators for Scherk that Alberto-Culver expected to received entirely unencumbered clear title to the trademarks being transferred, and that such was the reason for Alberto-Culver's negotiators insistance upon inclusion of the trademark warranties in the agreements. It was as a result of such insistence that the various Tarsia agreements and the LARA case in Italy

came to light. Having stressed the importance of the trademark warranties and having had certain exceptions to them disclosed, we believe that Alberto-Culver was entitled to rely implicitly upon Scherk's warranties when the agreements were signed.

In our opinion, the character, nature and value of the trademark rights as represented and warranted by Scherk differ so materially from their actual character, nature and value as to constitute a failure of consideration. Mr. Andrew's and your own recent discoveries dictate our conclusion that the Scherk trademark portfolio is encumbered with limitations, undisclosed by Scherk and not known by Alberto-Culver at the time the agreements were signed, which substantially reduce its value to any purchaser. The portfolio so encumbered must be considered of relatively small value compared to its value without such encumbrances.

Cordially yours,
/s/ B. W. Pattishall

BWP;maf
cc: C. Curtis Everett, Esq.
A. C. Lawrence, Esq.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

MOTION TO DISMISS, OR ALTERNATIVELY TO STAY

(Filed Aug. 31, 1971.)

Now comes defendant Fritz Scherk by his attorneys and moves this Court for an order (1) dismissing this action pursuant to Rule 12(b) of the Federal Rules of

Civil Procedure and quashing service of summons, or (2) dismissing the action on the grounds of forum non conveniens, or (3) alternatively, staying this action while the parties pursue arbitration. Defendant Fritz Scherk also moves this Court for an order striking plaintiff's claim for exemplary damages under Counts I and III.

As more fully appears in the briefs to be filed in support of this motion pursuant to local Rule 13 and the attached affidavits of Fritz Scherk (Exhibits A and B), and Gerard Batliner (Exhibit C), the declaration of the Swiss Federal Department of Justice and Police (Exhibit D), and the complaint with its attached exhibits, the grounds for this motion are as follows:

1. This Court has no jurisdiction of the subject matter of Counts I and III which allege a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The transactions at issue are all foreign based, not involving United States' securities markets, nor requiring protection by this Court of United States' investors. No claims are stated as to the four transactions at issue because securities are not involved or the allegedly false representations were not made as to the securities.

2. Service of process, apparently made pursuant to Rule 4(i)(D)(1), was insufficient. First, the files of this Court do not contain any certificate or affidavit of proper mailing by the clerk of the Court. Also, no receipt signed by defendant is on file showing proper delivery.

Secondly, any service of process by registered mail upon a domiciliary of Switzerland violates Swiss law and should not be recognized by this Court. (Declaration of Federal Department of Justice and Police, Exhibit D).

3. This Court lacks personal jurisdiction of defendant Scherk. Service of process was insufficient. (See item 2 above.) Scherk conducts no business, has no property and

maintains no residence in this district. Scherk has not had sufficient minimal contacts with this jurisdiction upon which to base personal jurisdiction. Scherk made no representations as to trademarks in this district. (Scherk affidavit, Exhibit A.)

4. This action should be dismissed on the basis of forum non conveniens. Defendant lives and works in Europe. Plaintiff Alberto-Culver does business in Europe. The parties agreed to arbitrate this dispute in Paris. The negotiations between the parties substantially occurred in Europe. The businesses acquired are all in Europe. Numerous witnesses and documents, including the official governmental records of the trademark registrations and alleged pending actions pertaining thereto, if any, are in Europe, beyond the jurisdiction of this Court. (Scherk affidavit, Exhibit B.)

5. If the action is not dismissed for any of the foregoing reasons, it should be stayed pending the outcome of arbitration agreed upon by the parties pursuant to 9 U.S.C. §3 and this Court's inherent power to regulate its own docket.

6. Exemplary damages may not be granted for alleged violations of Section 10(b) of the Securities Exchange Act of 1934. Only actual damages may be granted.

Dated: August 31, 1971

Respectfully submitted,
Fritz Scherk
By /s/ *Lynne E. McNown*
One of his Attorneys

Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603
641-6060

(Certificate of service omitted in printing.)

Exhibit A to Motion to Dismiss

EXHIBIT A

AFFIDAVIT

State of Israel)
) ss
)

State of Israel)
City of Tel Aviv/Jaffa)
Embassy of the United States) ss
of America)

Fritz Scherk, being duly sworn, on oath says:

1. I am a citizen of Germany and reside in Geneva, Switzerland, where I make my home. I maintain no residence or property in the United States of America, nor do I have or transact any business in that country.

2. About June, 1967 by a letter, and in November, 1967 by a visit I was contacted in Berlin, Germany, where I was then living, by Mr. Fred Maeding, an employee of Alberto-Culver, who inquired whether I would be interested in selling my businesses to Alberto-Culver. This was my first contact with Alberto-Culver. There ensued various negotiations in Berlin for the purchase by Alberto-Culver of these businesses. I was then asked by Alberto-Culver to send a representative to Chicago to directly negotiate with Mr. Lavin, President of Alberto-Culver. Mr. Benjamin Navon attended in Melrose Park, Illinois on or about December 20, 1967 on my behalf. Negotiations reached an impass and were terminated.

3. On or about February, 1968 I was again contacted by Alberto-Culver, who wished to renew negotiations, which were subsequently resumed in Berlin, and Mr. Lavin attended meetings in Berlin about March, 1968.

Exhibit A to Motion to Dismiss

In May, 1968 I came to the United States at the suggestion of Mr. Lavin, President of Alberto-Culver, for the purpose of attending a conference for the continuance with Mr. Lavin and other executives of Alberto-Culver, of the negotiations for the purchase of my businesses. This was my first visit to the United States since 1958. I spent approximately three days in the United States during this visit, and then returned to my home in Berlin. During my stay in the United States, I made no mention of any trademarks, except to state to Mr. Lavin that the businesses owned a number of them.

4. Following my return to Germany, the lawyers prepared drafts of agreements, and visited Europe on a number of occasions to obtain extensive information on the businesses and other matters, and there were further conferences and negotiations in Europe, particularly in December, 1968. I signed the agreements in Vienna, Austria in February, 1969 and the closing took place in Geneva, Switzerland in June of that year. I did not visit the United States again until nearly a year later, after Alberto-Culver had written me informing me that it was rescinding the agreements between us.

/s/ *Fritz Scherk*
Fritz Scherk

(Jurat omitted in printing.)

Exhibit B to Motion to Dismiss

EXHIBIT B

State of Israel)		State of Israel	)
	) ss	City of Tel Aviv/Jaffa	)
	)	Embassy of the United States of America	) ss)

Fritz Scherk, being duly sworn, on oath says:

1. I am the defendant in an action which I have been informed Alberto-Culver Company has purported to have instituted against me in the United States District Court for the Northern District of Illinois.

I am informed that this law suit arises out of the purchase by Alberto-Culver from me of certain businesses and that Alberto-Culver claims in this law suit that there have been breaches of warranties with respect to various trademarks registered in Europe.

2. The businesses in question are located in Germany and Liechtenstein in Europe. Their records are maintained, and all of their employees having first-hand knowledge of the businesses reside in Europe.

3. Extensive negotiations leading up to the sale of my businesses were carried on in Germany and Liechtenstein. Peat, Marwick and Mitchell Company, Chartered Accountants, and Drs. Broenner, Wirtschaftspruefer G.m.b.H. who examined the books of the businesses and certain experts who were consulted concerning trademarks and goodwill involved in the negotiations, reside and work in Germany, Austria and Liechtenstein.

Exhibit B to Motion to Dismiss

4. At the time of the sale of the businesses referred to, the businesses held a total of something over 275 trademark registrations effected in 10 countries of Europe and over 130 trademark registrations effected through filing in Geneva pursuant to the Arrangement of Madrid for the International Registration of Trademarks.

Each of these 130 registrations entitles the holder to rights in up to 10 European countries. A list of the registrations by number is annexed hereto as Annex A, which also lists registrations owned outside of Europe. No registrations were owned in the United States of America.

5. All of the official records filed with the respective and governmental trade-mark and Patent authorities concerning the above mentioned Europeans trademarks and their present status of record are located in Europe as are the attorneys who filed the original applications and processed them and maintained the registrations in effect.

6. I have heretofore been informed by my attorneys of the alleged agreements, and of the alleged "trademark actions", which Alberto-Culver claims constitute violations of warranties. All of the documents so referred to were signed in Europe, and all of the parties to them, to the extent that the parties still exist, and all persons who prepared these documents, are located in Europe. Similarly, the "alleged trademark actions", if they exist, are being carried on exclusively in Europe, and all of the attorneys carrying them on, and all of the official records with respect to them, are located there.

/s/ Fritz Scherk
Fritz Scherk

(Jurat omitted in printing.)

Exhibit C to Motion to Dismiss

EXHIBIT C

AFFIDAVIT

Principality of Liechtenstein)
) ss
City of Vaduz)

Confederation of Switzerland)
Canton and City of Zurich)
Consulate General of the) ss
United States of America)

Gerard Batliner, being duly sworn, on oath says:

1. I am a member of the bar of the principality of Liechtenstein and authorized to practice in the courts of Liechtenstein. I represented Mr. Fritz Scherk in an action which he commenced in the Liechtenstein Landgericht, a court, in February, 1971 against Scherk Enterprises V. Aktiengesellschaft, a Liechtenstein corporation ("SEV") owned by Alberto-Culver Company. This proceeding was brought by Mr. Scherk to preserve interalia the status quo; in it, he sought and obtained from the court an injunction forbidding SEV to transfer or hypothecate its property to Alberto-Culver or to settle claims of Alberto-Culver and requiring approval of the Liechtenstein directors of SEV for actions of the SEV Board of Directors.

2. SEV was represented in this action by Dr. Peter Ritter, also a Liechtenstein lawyer. In an appeal against this injunction, SEV argued that

> "(a) . . . In this provision (Section 9.4 of the agreements of February 11 and 12, 1969) Fritz Scherk and the Alberto-Culver Company agreed, viz., on the exclusive jurisdiction, for all controversies or claims arising out of this contract or its breach, of the International Chamber of Commerce, Paris, France, as arbitral court. It is very questionable whether a judi-

cial injunction proceeding (Sicherungsverfahren) is at all permissible when the basic claim can be decided only by the arbitral tribunal, so that as a practical matter, the justificatory complaint underlying the injunction (Sicherungsbot) could be initiated only in this arbitral court. This is, as mentioned, questionable if either a local court or a local arbitral court were to be occupied with the matter.

"(b) But such an injunction proceeding is absolutely inadmissible if the principal claim can be established only in a foreign arbitral court, whose decree is not even enforceable locally. A decree of a French arbitral court is denied direct enforceability in Liechtenstein. The plaintiff bases his claim for the injunction on his claims against Alberto-Culver. These claims can be established only, as mentioned, in a French arbitral court.

"For this reason the present injunction is inadmissible, as a consequence of lack of jurisdiction or inadmissibility".

The foregoing is quoted from page 17 of Dr. Peter Ritter's brief of March 16, 1971, a copy of which page is annexed to this affidavit as Annex A.

3. The Landgericht upheld the injunction stating in part that

"The impossibility of direct execution of an arbitral decree in the main action does not prevent at all a local injunction proceeding. An arbitral decree of the Paris International Chamber of Commerce would in addition be a title for rejection of opposition against an official order of payment (Rechtsöffnungstitel) in Liechtenstein" (extract from page 7 of May 5, 1971 decision of Landgericht, a copy of which page is annexed hereto as Exhibit B).

/s/ *Gerard Batliner*

Gerard Batliner

(Jurat omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF FRANCIS J. HIGGINS
(Filed Oct. 4, 1971.)

Francis J. Higgins, being first duly sworn, on oath deposes and says that:

1. I am an attorney duly admitted to practice before this Court and before the Courts of the State of Illinois.

2. I have read the Affidavit of Mr. Gerard Batliner, Liechtenstein counsel for Mr. Scherk, filed in support of the pending Motion to Dismiss.

3. I am personally familiar with the Liechtenstein litigation referred to in the Batliner Affidavit, having gone to Liechtenstein in May, 1971, to aid Alberto-Culver Company's Liechtenstein counsel in preparing an appeal from an injunction issued by the Liechtenstein trial court in favor of Mr. Scherk against Scherk Enterprises V. Aktiengesellschaft ("SEV") a Liechtenstein corporation owned by Alberto-Culver Company.

4. The Liechtenstein litigation instituted by Mr. Scherk was not based upon and did not involve the Securities and Exchange Act of 1934 nor did it seek to enforce any rights created by the Agreements attached to the Complaint in this case. Instead, it was based upon a claimed "contract of rescission" of those Agreements alleged by Scherk to have been entered into between Scherk and Alberto-Culver

Company as a result of certain subsequent correspondence in 1970. Alberto-Culver Company was *not* a party to the Liechtenstein case.

5. In a Decision dated August 11, 1971, the Appellate Court of Liechtenstein (Furstlich Liechtensteinisches Obergericht) reversed the lower court and vacated the injunction against SEV on the grounds, upon other things, that Scherk's claims, if any, could be made only against Alberto-Culver Company and not against SEV. In its Opinion, the Appellate Court noted that "an arbitration tribunal could only be agreed to for disputes between the plaintiff and Alberto-Culver, not between the plaintiff and third parties", i.e., SEV. The Appellate Court also noted in its Opinion that Scherk's claim was not based on the 1969 Agreements of acquisition and that therefore the arbitration clauses in those Agreements did not apply to the dispute brought by Scherk before the Liechtenstein Courts.

/s/ *Francis J. Higgins*
Francis J. Higgins

(Jurat omitted in printing.)

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

AFFIDAVIT OF ROBERT D. SILVER
(Filed Oct. 4, 1971.)

Robert D. Silver, being first duly sworn, on oath deposes and says that:

1. I am General Counsel and a Vice-President of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois, and I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint against him.

2. In August, 1968, I was informed by Mr. Leonard H. Lavin, the President of Alberto, that an agreement had been reached with Mr. Scherk for the acquisition by Alberto of Scherk Etablissement Vaduz (hereinafter called "SEV"), Firma Ludwig Scherk (hereinafter called "FLS") and Lodeva Herstellung and Vertrieb Kosmetischer Artikel GMBH (hereinafter called "Lodeva"). Mr. Lavin requested that I work with Alberto's executives and outside counsel in the negotiation of the language, structure and terms of the written agreements to be executed by Alberto and Mr. Scherk.

3. Alberto's outside counsel in this matter was Mr. Walter Treumann of the firm of Bell, Boyd, Lloyd, Haddad and Burns, Chicago, Illinois. In addition, I retained the

services of the firm of Pattishall, McAuliffe and Hofstetter, Chicago, Illinois, to work with me on the trademark aspects of the agreements.

4. Mr. Scherk was represented in these negotiations and discussions by Mr. Stuart Marks, an attorney from New York City, New York.

5. In early June, 1968, Mr. Marks and Mr. Scherk met with Mr. Treumann in Chicago, Illinois, and thereafter, for a period of several months, Mr. Marks sent from New York to Chicago extensive information concerning the trademarks purportedly owned by the Scherk businesses and revenues generated by SEV. (See Exhibits A through J attached hereto.)

6. During the month of November, 1968, at a time when Mr. Treumann, the Pattishall firm and I had under consideration the language of the trademark warranties to be included in the agreements, Mr. Marks sent to Mr. Treumann in Chicago a telegram and a letter which are referred to and quoted in paragraphs 7(a) and 7(b) of the Complaint. Copies of the telegram and letter are attached hereto as Exhibits K and L.

7. On December 8, 1968, I was present at a meeting at the offices of the Pattishall firm. Mr. Marks came to Chicago to attend that meeting for the express purpose of discussing the trademarks. During the meeting, other attorneys for Alberto and I addressed to Mr. Marks a large number of questions concerning the trademark portfolio as reflected on the attached Exhibit M. Mr. Marks stated during the meeting that he had just returned from Germany where he had investigated the status of the trademark portfolio. Having read the telegram and letter referred to in paragraph 6, I expressly asked Mr. Marks on

that occasion whether there were any restrictive agreements, opposition proceedings, litigation or other legal proceedings, past, pending or threatened, with respect to the trademarks other than those referred to in Exhibit M. Mr. Marks replied that he had checked into the matter and had determined that there was none.

8. Mr. Marks was again present in Illinois in late January of 1969 to discuss with Alberto's representatives the appropriate means of transferring to Alberto the trademarks owned by the Berlin business. As attorney-in-fact for Mr. Scherk, Mr. Marks executed either in New York or Chicago a lease of the Berlin assets from Scherk to Alberto. This was done in order to protect the trademark rights being transferred to Alberto.

9. Both the agreements and the promissory notes were executed by Alberto in Melrose Park, Illinois, in February, 1969, and forwarded to Europe for execution by Mr. Scherk. The FLS and SEV agreements contain the express warranties referred to in paragraph 7(d) of the Complaint. Attached hereto as Exhibit N is the stock certificate representing all the shares of SEV acquired by Alberto.

10. In 1970, after Alberto had acquired the Scherk businesses, there was brought to my attention for the first time a legal proceeding relating to one of the warranted trademarks. I therefore sent Mr. John Andrew of the Pattishall firm to Germany for the purpose of making a thorough investigation of the status of the trademark portfolio. Upon his return, the Pattishall firm advised me in their letter dated April 6, 1970, (Exhibit 5 to the Complaint and Exhibit C to the Lavin Affidavit) of the trademark impairments which he had discovered and of their

conclusions as to the effect of such impairments upon the value and validity of the warranted trademark portfolio acquired by Alberto. Mr. Andrew brought back from Germany all of the principal documents evidencing the restrictive agreements and proceedings referred to in the Pattishall letter. All such documents will be available in this jurisdiction for use in discovery and at trial. To the extent that certified copies of foreign court records and official governmental documents may be required, they can be easily obtained by mail.

/s/ Robert D. Silver
Robert D. Silver

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

EXHIBIT K TO SILVER AFFIDAVIT

WESTERN UNION TELEGRAM

(Handwritten notes omitted.)

1968 NOV. 15, A.M. 10 31

BERLIN FA 1/TF 119 15 1632 PAGE 1/50
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BELLBOYD CHICAGOILL

Exhibit L to Silver Affidavit

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EXHIBIT L TO SILVER AFFIDAVIT

(Letterhead of Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, N.Y. 10022)

November 26, 1968

AIR MAIL
SPECIAL DELIVERY
Walter Treumann, Esq.
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle Street
Chicago, Illinois 60603

Dear Walter:

This letter will cover a number of points which have been raised:

1. Enclosed are copies of the charter documents of Lodeva and Scherk Gesellschaft G.m.b.H.

2. I would like to press strongly for a trademark representation in the text enclosed. I am advised by Langner, Parry (both in New York and Chicago) that this is all that anyone can reasonably say or be sure of, and I would imagine that this is all Alberto-Culver's trademark com-

sel can safely say about the Alberto-Culver marks. We would of course be willing to add what I mentioned this evening, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark of Scherk.

3. The post-war history of title to the marks is set forth in the following documents, copies of which are enclosed:

a. *Decision of Restitution Court nullifying sale agreement between Ludwig Scherk and Scherk GmbH. of June 29, 1938.* At the time of this decision, Scherk GmbH. bore the name Tarsia. The latter was ordered by the decision to restore to Firma Ludwig Scherk, said to be exclusively owned by Fritz Scherk, the enterprise which Ludwig Scherk had sold to Scherk GmbH. in 1938. The Grunde recite the various name changes of Scherk GmbH. and also explain something about Ludwig Scherk's will.

b. *Decision of Restitution Court ordering Estate of Ludwig Scherk to make certain payments to Tarsia.*

c. *Agreement between Estate of Ludwig Scherk, Fritz Scherk, Tarsia and Schering carrying out the above decisions.* You will note that paragraph I(1) (c) deals with the transfer to Fritz Scherk of various trademarks. Paragraph II(1) deals with "Tarr," "Tarsia," etc. in Germany and will give you, I believe, the information Mr. Silver wanted on this subject.

d. *Notarial act with respect to assets of Ludwig Scherk and interests therein.* By this instrument, the executor of Ludwig Scherk, who had a five per cent interest in certain

assets in the latter's estate, agrees to sell that interest to Fritz Scherk for a sum of money.

I trust that the above will help clarify the situation.

Sincerely,

Stuart

SM:bp

Enclosures

P.S.: Since this is being sent out before I have read it, I am not sure that all the enclosures are legible. If some are not, I will send you better copies on Wednesday.

EXHIBIT M TO SILVER AFFIDAVIT

QUESTIONS POSED TO MARKS AT DECEMBER 8, 1969 CONFERENCE

(Handwritten notes omitted)

1. Clause 6(e) of will—German lawyer says.
   English lawyer says only applies in United Kingdom.

   Math.—FS reciprocal offers.
   Math. giving letter—no claims under estate.

   Berlin—March 1, 1957: National Act
   Math. giving up rights

   SM drafting disclaimer—release for Math.

2. Walter Scherk agreement antitrust problem—okay SM.

3. Executory aspects of 1960 Walter agreement.

   Walter Scherk still owns TARS, 144,403 in Switzerland. Others?

4. Fritz: failure to observe WS-FS agreements.

   Cancel international registrations—gives us something to bargain with Walter with SM.

Exhibit M to Silver Affidavit

5. Italy—"MISS LARA" registered by our licensee, Soc. des Grandes Marques, SpA.
Will be cancelled—SM
Sure it can be handled.

6. TARR story

29 June 1951—Austrian restitution.
Tarsia GmbH Wien restored to estate of Ludwig Scherk.

Is Tarsia GmbH Wien still in existence? SM to check. Who owns 18.786 and 18.787 SCHERK registrations in Austria? SM to check.

Is Tarsia GmbH Wien present Scherk GmbH Wien by change of name? SM to check.

Did Schering sell off any Scherk properties or companies between 1938 and 1950? SM doesn't know—will ask.

Executory acts required of parties to 1950 Restitution agreement. Tarsia GmbH still holds 1924 SCHERK, Reg. No. 323,873. SM will find out about it.

Tarsia-Berlin owns Reg. No. 14,193—SCHERK, renewed in 1964. Greece—SM to check.

Italy—Tarsia SA Milan owns TARR and LARA registrations 1950. What has become of this company? SM to find out.

1963 agreement—RS:poses commercial problem of some moment. Don't know what Lavin will do.

Quid pro quo for 1963 agreement—SM doesn't know.

Joint defense obligations. No assignment clause in 1963 agreement.

License agreements—many governed by Swiss law. Talked to Swiss lawyers—similar to American law. SM requests that RDS talk to Nadler first.

Exhibit M to Silver Affidavit

7. Anything between parties to 1963 agreement since then? SM to find out.

8. Austria—no certificates received.

9. Netherlands—what happened to N.V. Scherk?

10. Turkey—problem between search report and listings. English company on list—10310, 10309, 10308. From search: 29,822, 29,823 and 29,824—1963 registrations in name of English company. Need certificates for those. Turkey—license. Royalty payments. Contract says none. Private annex says one thing—oral agreement says other. Payments made under table to avoid exchange controls. SM to get story. RS to let Nadler know.

11. Portugal—why two TARR and SCHERK registrations not cover cosmetics? SM to find out.

12. Germany—International registration extensions to Germany in apparent contravention (based on two German registrations).

	German
TARSIA	238,750
TARS	447,818
TARR	451,979
TARR bottle	454,797

—held to protect old rights. FS realizes can't use in Germany.

LARA—registration in 1959, 725,614, in Fritz's name. Transfer clause—should include FS personally. International registration based on this one. SM guarantees we get it.

13. East Germany—told that FS is selling TARR there. SM doesn't know figures. Doesn't know if it is TARR. SM will check.

Would be in violation of restitution and 1963 agreements.

14. We have problem with our proper recipient in Germany. SM-FS wants to know if we are buying assets or Firme Ludwig Scherk?

15. Liechtenstein—SEV licenses German FLS. Includes TARR marks. Prohibited in Germany.
AM to check. May just delete TARR mark from list.

16. Executory obligations of existing agreements.
FLS to do within a time period or we do at his expense. SM basically agree.

17. Divorce. Didn't mention terms at all. SM. Fritz agreed to leave half of property to kids—owned at his death.
No encumbrances to existing property.

Warranties—
SM—U.S. and Canada not essential.
Not making any warranties all around world.
Will warrant only where they know they do have rights.

There are no registered license agreements.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF LEONARD H. LAVIN

(Filed Oct. 4, 1971.)

Leonard H. Lavin, being first duly sworn on oath deposes and says that:

1. I am President and Chief Executive Officer of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois. I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint of Alberto against him.

2. Alberto is and at all relevant times has been engaged in the business of manufacturing and distributing consumer products, including toiletries, hair products and related items for the mass market. Prior to February, 1969, Mr. Scherk was the owner of several interrelated businesses engaged in the manufacture and sale of cosmetics and related items in Western Europe and elsewhere. Most of the direct manufacturing operations of Mr. Scherk's businesses were conducted in facilities located in Berlin, Germany. These manufacturing facilities were owned and operated by Mr. Scherk through a sole proprietorship called Firma Ludwig Scherk (hereinafter called "FLS").

3. By contrast, the Scherk entity known as "Scherk Etablissement Vaduz" (hereinafter called "SEV") was a Liechtenstein "establishment" which operated as a holding company licensing on an international basis the sale of Scherk products under a wide variety of trademarks purportedly owned by SEV.

4. The consumer identification and acceptance of the marketed products is intimately associated with the brand name. Businessmen in the mass toiletries and cosmetics market normally expend advertising, promotion and selling effort on brand names that are trouble free and which will aid in selling the product. Care is exercised to avoid infringing the rights of third parties and to avoid other limitations on flexibility, or use, or enjoyment.

5. In 1967, Alberto entered into negotiations with Scherk and his Berlin plant manager, Benjamin Navon, for the possible purchase by Alberto of all or part of the Scherk businesses. In December, 1967, I personally met with Mr. Navon in Melrose Park, Illinois, and discussed with him the nature and background of the Scherk businesses. Mr. Navon pointed out to me that, although the "German business" (FLS) had experienced serious financial difficulties in recent years, the "Scherk International Business" (SEV) had earned substantial profits through royalty income derived from its trademark-licensing arrangements. Mr. Navon stated that the success of SEV was due in large part to the effective exploitation of the SEV trademark portfolio through license agreements which generated significant royalty income. He asserted that consumers in the licensed areas responded favorably to SEV's brand names. Mr. Navon advised me that Mr. Scherk would be most reluctant to sell this "International

Business" and our discussions centered for the most part on a possible Alberto acquisition of FLS, the unprofitable German business, for a price in the area of $500,000. When Mr. Navon returned to Germany, I received a letter from Mr. Scherk rejecting the offer I had made for the German business.

6. Thereafter negotiations were resumed. I met with Mr. Scherk in Europe in March, 1968, and, as a result of renewed interest on both sides, Mr. Scherk, Mr. Navon and Mr. Scherk's New York lawyer, Mr. Stuart Marks, came to Melrose Park in late May or early June, 1968, for further discussions. Mr. Scherk met with me and other Alberto representatives and extensive and detailed discussions over a three-day period were held in Melrose Park and Chicago, Illinois. As a direct result of these discussions, Mr. Scherk and I came to an agreement in Melrose Park as to the basic terms of the acquisition, including the price to be paid by Alberto. In contrast to the earlier negotiations in December, 1967, the negotiations in Melrose Park were conducted on the premise that Alberto would acquire not only the unprofitable German business but the profitable SEV royalty operation as well.

7. I have read the Affidavit of Mr. Scherk filed in support of his Motion. The Affidavit states, with respect to the meeting in Melrose Park in May, 1968, that "I made no mention of any trademarks, except to state to Mr. Lavin that the business owned a number of them." This statement is erroneous and misleading. During the meeting in Melrose Park, Mr. Scherk, in justification of his argument that his businesses were worth substantially more than Alberto had been willing to offer, repeatedly referred to the valuable trademark portfolio owned, in particular, by

SEV, the great drawing power of the name "Scherk" and other trademarks owned by SEV, and the royalty profits generated by SEV through licensing of the trademark rights. He also emphasized the value of the trademark portfolio to Alberto both for use in connection with Scherk products and as a means of gaining access for its own products to Germany and the licensed countries. I recall that Mr. Scherk particularly mentioned the trademark "LARA" as being especially valuable and significant.

8. In his Affidavit, Mr. Scherk also states that he came to Melrose Park at Alberto's suggestion. This statement also requires clarification if it is not to be misleading. The previous negotiations in Europe had been promising but no agreement had been reached. In his letter to me dated April 30, 1968, (attached hereto as Exhibit A) Mr. Scherk suggested further discussions in Melrose Park to be held with his representatives, Navon and Marks. I simply suggested that Mr. Scherk also be present. The initiative for continuing the discussions in Melrose Park came from Mr. Scherk, not from Alberto.

9. During the discussions in Melrose Park, I offered on behalf of Alberto, and Mr. Scherk accepted, the following terms:

(a) For FLS—$250,000 in cash on December 12, 1968;

(b) For SEV—$166,000 in cash on February 28, 1969; $800,000 in notes;
A contingency agreement in the amount of $1,100,000;

(c) Consulting Agreement—$250,000 in cash on February 28, 1969.

Although these figures were subject to certain adjustments and conditions as reflected in the final agreements

(Exhibits 1 through 4 to the Complaint), the fact that agreement between Mr. Scherk and myself as to the basic terms of the acquisition was reached in Melrose Park, not in Europe, is evidenced by the letter which I received from Mr. Scherk dated June 9, 1969, attached hereto as Exhibit B. In that letter Mr. Scherk, in inviting me to attend the formal closing in Europe, stated:

> "It is more than a year that we last met at *Melrose Park to agree upon a transaction* which will now, at long last, come to its closing.
>
> ". . . and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close *the deal which I was glad to have agreed to at your office, one year ago.*" (Emphasis added)

10. At no time during the negotiations did Mr. Scherk, Mr. Navon or Mr. Marks ever inform me, nor was I aware of, any of the trademark impairments disclosed in the letter from Alberto's outside trademark counsel, Pattishall, McAuliffe & Hofstetter, dated April 6, 1970, which is attached to the Complaint as Exhibit 5 and to this Affidavit as Exhibit C.

11. In authorizing the execution of the acquisition agreements by Alberto, I believed and relied upon both the representations which had been made to me by Mr. Navon and Mr. Scherk with respect to the trademarks and the express trademark warranties contained in the agreements themselves. The agreements would not have been signed by Alberto without such representations and warranties.

12. In addition to myself, the following past and present employees of and attorneys for Alberto took part in the negotiations and discussions which preceded the execution of the acquisition agreements:

Exhibit A to Lavin Affidavit

(a) James Nadler
(b) Robert Silver
(c) Fred Maeding
(d) John Murphy
(e) L. I. Green
(f) S. W. Pike
(g) E. C. Friedel
(h) Michael Winn
(i) Ronald Steitz
(j) Walter Treumann
(k) George Martens
(l) John Andrew
(m) Jeremiah D. McAuliffe
(n) Karlheinz Quack
(o) Beverly Pattishall

13. All of the above-named persons, with the exception of Mr. Quack, Mr. Green and Mr. Pike, are residents of the Chicagoland area.

/s/ *Leonard H. Lavin*
Leonard H. Lavin

(Jurat omitted in printing.)
(Certificate of Service omitted in printing.)

EXHIBIT A TO LAVIN AFFIDAVIT

(Letterhead of Europäische Kosmetik)
Scherk 1 Berlin 41 Postfach
(Time stamp omitted.)

Mr. Leonard H. Lavin, President
Alberto-Culver Company
2525 Armitage Avenue
Melrose Park, Illinois 60160, U. S. A.

Ihre Zeichen	Ihre Nachricht vom	Unsere Zeichen	Datum
	April 9, 1968	FS/do	April 30, 1968

Exhibit A to Lavin Affidavit

Dear Mr. Lavin,

Thank you very much for your letter of April 9. I am sorry that we have not been able to reply to it before this.

First, let me state that it was indeed a pleasure for us to have you visit us during your recent trip to Europe and to be able to give you some of our products, which we are happy to learn are being used by your family.

I, too, regret that the deal which we discussed has not come along further, despite efforts on both sides, and am sorry that a misunderstanding seems to have arisen. I hope this letter, in which I shall try to set forth my views, will help clear it up.

Basically, what we are discussing is the sale to Alberto-Culver of the Scherk German and international business, that is, the entire Scherk Business with the exception of land and building (which I understand you are not interested in purchasing) and the Israel, United States and Canadian trademarks. As you know, this is a business which was established under the Scherk name as early as 1906, includes a well-established distribution organization, and finds a high degree of customer acceptance for products marketed under its name in Germany as well as in all of the major European markets, not to mention the promising sales in other parts of the world.

In our discussions, I stated that I thought that a fair price for this business was three years net sales of the business being sold (excluding, of course, sales in Israel, the United States and Canada). This figure came to DM 9,720,036 or $2,460,768. In the interest of avoiding negotiations over minor points, I agreed at the very outset to reduce the price to $2,150,000.

It was and is my view, which I believe I expressed at our meeting, that this is an eminently reasonable price for the purchase today "as is" of a going business with the

name and reputation, sales and prospects of ours. Nevertheless, in order to give further assurance that you will be getting full value, I volunteered to act as consultant for three years without pay and offered to guarantee that profits (after United States income taxes) for the fourth, fifth, and sixth years after acquisition will equal or exceed 5% of the purchase price actually paid, i.e. $321,500 after United States income taxes (your figure of $375,000 is based, I believe, on the purchase price first proposed, namely, approximately $2,500,000.)

Furthermore, I offered to secure this guaranty by leaving in escrow, out of the purchase price, the sum of $800,000, an amount which *exceeds* both the total guaranteed profits *plus* an equal amount representing United States income taxes. In the event the profit target is not equalled or exceeded, something which I consider to be unlikely, this escrow fund, which I was to be permitted to invest in the meantime, would be used to reduce the purchase price.

I had assumed that you understood the proposal as I have outlined it here, since the only amount which I recall discussing for the escrow was the $800,000 amount referred to above. I continue to believe that withholding the sum of $800,000 out of a total purchase price of $2,150,000, which itself represents a reduction of our original price, is indeed a most generous proposal, for it represents in excess of a third of the purchase price.

I hope that on reconsideration you will agree with these views. Once this point is settled, I believe, we can proceed rapidly with a transaction which I believe, is in the best interests of both of us.

Exhibit B to Lavin Affidavit

In order to avoid any further misunderstandings and, above all, further delays, I would suggest that my brother-in-law, Mr. Navon should come over to Chicago with our lawyer Mr. Stuart Marks, of Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York. This way a preliminary agreement on the principles of the deal can be concluded, leaving legal and other details to the experts.

Although Mr. Navon has my power of attorney to sign and conclude any agreement I could, if you so wish, come over on shortest notice for signature.

With best wishes,

Sincerely yours,
/s/ *Scherk*

EXHIBIT B TO LAVIN AFFIDAVIT

F. Scherk, A rue Heum Speiss, 1208 Geneve, Suisse
Hopital Cantonal Sect. B9, Geneve

Dear Mr. Lavin, 9-6-69

(Please excuse my handwriting; I am writing in bed after 2 surgical interventions.)

It is more than a year that we last met at Melrose Park to agree upon a transaction which will now, at long last, come to its closing.

It was, then, both our feeling and conviction that any final decision was to be taken by two men chiefly concerned and responsible: you and me.

I still agree to that conception and I do regret—to some important measure—that, during this long year of negotiations, we did not personally conduct the procedure leading to the final act of closing of a deal, which not only is the closing of a past but an opening of a future. A future full of both personal and impersonal prospects, as we hope, —this hope being the motivation for the deal itself.

Exhibit B to Lavin Affidavit

I am, now, informed, that "closing" will take place around the 17th June, here in Geneva and be effectuated by the lawyers of both sides. This may (or not) be an "American way" of procedure and it might also be your personal attitude when you acquire a business for your company.

My own view is that such a final act should be performed on the appropriate level of those who initiated it—decided upon it and are the ones deeply responsible. That is, you and me.

It might be my personal wish or even an old European tradition that one hands the key of ones property to the buyer himself. Whatever you may think and even if you felt it to be a nuisance: I wish you to perform the closing with me assisted by those who took great pains and trouble to bring it about and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close the deal which I was glad to have agreed to at your office one year ago. Personally I believe that I shall be out of hospital within the next 8-10 days, so that this would be fixed on or about the 17th as provided—if it suits you. It could also be in Berlin after the 20th.

I do hope that, again, we agree and that we would, thus, await the future in the same spirit.

Yours sincerely,

F. Scherk

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

AFFIDAVIT OF HAROLD R. JUDELSON

(Filed Nov. 5, 1971.)

Harold R. Judelson, being first duly sworn, on oath deposes and say that:

1. I am the Vice President, International Division, of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois. I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint of Alberto against him.

2. As Vice President, International Division, of Alberto, I have executive responsibility and direct supervision over all of Alberto's international activities and operations. Alberto's international activities and operations include Firma Ludwig Scherk (hereinafter called "FLS"), a direct branch of Alberto; Scherk Etablissement Vaduz (hereinafter called "SEV"), a wholly owned subsidiary of Alberto; and Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH (hereinafter called "Lodeva"), also a wholly owned subsidiary of Alberto.

3. FLS combines what had been the business of that concern when conducted by Fritz Scherk, since reorganized, modernized, developed, and conducted by Alberto, and Alberto's direct German operations. After the acquisition, the operations, including machinery and equipment, fixtures, inventories, administrative, sales, and manufacturing personnel, agencies, and other aspects of the businesses were consolidated. SEV operates as a trademark

holding company and funnel for the collection of royalties, such as they are, from the sale of products in various countries and as a service to licensees for the promotion of Alberto and Scherk products in those countries. Lodeva is and has been since the acquisition an entirely dormant German corporation.

4. Since the acquisition, the business policies and procedures for the management and operation of FLS and SEV have been made in Melrose Park, Illinois. Direction, supervision, control, functional authority and responsibility in the areas of administration, production, purchasing, marketing, finance and accounting, and formulations, laboratory and technical activities reside with and have been exercised by responsible executives under my management in Melrose Park.

5. Among the activities conducted in Melrose Park in connection with FLS and SEV, since the acquisition, have been the following: development, detailed direction and supervision of administrative and accounting procedures, systems and methods, actual control of capital expenditures (over $2,000.00) and other such contractual commitments, appointments and approval of agencies and consultants, employment of and compensation approval for certain employees, budget review and modification, decisions on resource allocation; marketing decisions and extensive and continuous management, planning and assistance concerning product and territory sales activities, promotion, advertising, market research, brand reviews, product elimination and new product development; creation and formulation and reformulations of many products, frequent research and development, packaging design, quality control specifications and procedures, and other technical activities.

6. In the course of these activities, materials and products, including equipment and materials for testing, quality control and technical purposes, designs, films, advertising sheets, merchandising materials, marketing brochures, raw material and product samples, forms, records and reports, a constant interchange of information and management papers, have been transferred between Melrose Park and Germany.

7. As contemplated by the acquisition agreements, products emanating from the Scherk business have been advertised and promoted within the United States and products produced according to the Scherk product and packaging concepts have been manufactured, marketed and sold by Alberto within this country. Alberto products, created, formulated and developed within this district, have also been manufactured, marketed, sold and Alberto trademarks for these products licensed by Alberto through its FLS and SEV operations abroad.

8. Since the acquisition there have been communications between Fritz Scherk and Alberto in Melrose Park about the acquisition transaction and the business, and Fritz Scherk has come to Melrose Park, Illinois. Mr. Scherk came to Melrose Park in March 1970, and I met with him then, at which time the notes by which Alberto's performance under the transaction agreements was to be made, the business and consultation by Scherk in connection with the business were discussed.

9. True and correct copies of the notes as attached to the transaction agreements and found in the files of Alberto International Division, together with a receipt signed by Fritz Scherk on June 18, 1969, are attached hereto as Exhibits A-E.

Exhibit A to Judelson Affidavit

10. Alberto is a publicly-held corporation and its stock is traded on the SEC regulated New York Stock Exchange. I am generally familiar with the amount of outstanding Alberto common stock held by a number of major shareholders residing in Cook County, Illinois, and can state that a large percentage of Alberto common stock presently outstanding is held by residents within this United States judicial district.

/s/ *Harold R. Judelson*
Harold R. Judelson

(Jurat omitted in printing.)
(Certificate of Service omitted in printing.)

EXHIBIT A TO JUDELSON AFFIDAVIT

June 18, 1969

Received from AC

Check for D M 1,080,360
4 promissory notes (in
accordance with June 16
Closing Agremt.)
/s/ *Fritz Scherk*

EXHIBIT B TO JUDELSON AFFIDAVIT

PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Million Four Hundred Thousand (DM 2,400,000) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

This note is subject to prepayment at any time in whole or in part without penalty.

This Note may be declared due prior to its expressed maturity, and without notice, in the event of default in the payment of interest within thirty days after the same shall become due.

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This Note is subject to the following provisions of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company:

Exhibit B to Judelson Affidavit

"Section 1.2

. . .

(b) . . .

(i) . . . Such note may be negotiated with the approval of AC, such approval to be withheld only if AC has reason to believe that the note may directly or indirectly be sold or transferred (A) to an entity competitive with AC or (B) to a person described in Section 1000.324(e)(4) of the United States Foreign Direct Investment regulations within three (3) years after the date of closing or such shorter period, if any, as may be specified in any amendments to such regulations. Approval is hereby granted for the negotiation of said note to a European branch of a United States commercial bank, provided Seller advises Alberto-Culver Company of such negotiation."

"Section 9.6

"In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an 'upward revaluation' of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Exhibit C to Judelson Affidavit

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

EXHIBIT C TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1970, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

Exhibit C to Judelson Affidavit

"In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERT-CULVER COMPANY

By .....

Vice President

EXHIBIT D TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March and June.

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1971, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

> "In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United

States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

EXHIBIT E TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

Exhibit E to Judelson Affidavit

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1972, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

> "In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

ORDER

Date November 9, 1971

• • •

Leave is granted to Defendant to file Answer to interrogatories instanter. Defendants given thirty days to file reply brief. Order Cause continued to December 16, 1971 at 10:00 A.M. for decision.

W. J. L.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

MOTION FOR PRELIMINARY INJUNCTION RESTRAINING PROSECUTION OF ARBITRATION INSTITUTED BEFORE THE INTERNATIONAL CHAMBER OF COMMERCE

(Filed Nov. 22, 1971.)

Plaintiff Alberto-Culver Company, a Delaware corporation, by Francis J. Higgins, its attorney, respectfully moves this Court for a preliminary injunction enjoining and restraining the defendant Fritz Scherk, pending the final hearing and adjudication of this action, from prosecuting a certain arbitration proceeding heretofore instituted by him before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

As grounds for this Motion, plaintiff represents:

1. Plaintiff filed this action on June 11, 1971, against the defendant Fritz Scherk seeking relief under the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., and Rule

10b-5 of the Securities and Exchange Commission, as well as the common law, for the defendant's false and fraudulent misrepresentations and omissions in connection with the sale by defendant to plaintiff of certain securities.

2. In response to the Complaint, the defendant filed a Motion to Dismiss or Alternatively to Stay supported by a brief, and the plaintiff filed an answering brief on November 5, 1971. On November 9, 1971, after having received the plaintiff's brief, the defendant instituted arbitration proceedings against the plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France. Those proceedings were filed while this Court had under advisement the jurisdictional issues raised by defendant as well as the plaintiff's request in the Complaint that any such arbitration proceeding be enjoined. On the following day, November 10, 1971, without disclosing to the Court or to the plaintiff that such proceedings had been instituted, the defendant obtained a thirty day extension of time in which to file his reply brief and a deferral of the date set by the Court for ruling on the pending motion. Pursuant to the Rules of the Court of Arbitration, plaintiff is required to respond to the Request for arbitration on or before December 15, 1971. As a result of the deferral of the Court's ruling date to December 16, 1971, obtained by Scherk after the arbitration proceedings had been instituted, the plaintiff will be required to respond in Paris before such ruling date.

3. The matters placed in issue by the defendant in the arbitration arise out of the same transaction as and are virtually identical to those raised in the Complaint herein and are such that the defendant must assert them by way of defense or counterclaim in this action. A copy of the Request for arbitration as served upon the plaintiff on November 15, 1971, plus an English translation, as well

as a copy of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, are attached hereto and made a part hereof as Exhibits A, B and C.

4. The arbitration provision asserted by the defendant in its Request for arbitration is void and unenforceable under Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. §78cc. See, *Wilko* v. *Swan,* 346 U.S. 427 (1953) and other authorities cited at pages 40-42 of plaintiff's Brief in opposition to defendant's Motion to Dismiss or Alternatively to Stay.

5. Jurisdiction of this cause is based on Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa. Service upon the defendant has been made pursuant to Rule 4(e) and (i) of the Federal Rules of Civil Procedure and return of service has been made to this Court.

6. The false and fraudulent misrepresentations and omissions were made by the defendant to the plaintiff in this district.

7. By reason of the foregoing, this Court has complete and exclusive jurisdiction of the subject matter and of the parties under Section 27 of the Securities Exchange Act, 15 U.S.C. §78aa, and venue is properly laid in this district.

8. Unless defendant is restrained by this Court, he will continue to prosecute the arbitration in Paris, France, thereby preempting this Court's exclusive jurisdiction under the Securities Exchange Act and Rule 10b-5, interfering with this Court's control over the progress and orderly procedure of this cause, and creating the danger of conflicting adjudications of the matters at issue. The plaintiff will be further subjected to the vexation and economic waste arising from unnecessary concurrent and duplicative litigation with the same party over the same issues in Chicago and in Paris. In addition, any adjudication by

an arbitrator in Paris against the plaintiff, although void and unenforceable under United States law, will threaten the plaintiff with attempted enforcement proceedings in foreign jurisdictions which may give it recognition. Such action by the defendant, unless enjoined, will result in irreparable damage, loss and injury.

9. The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendant but will preserve and enforce the jurisdiction of this Court to adjudicate all matters in controversy between the parties.

WHEREFORE, plaintiff requests that the Court issue herein a preliminary injunction enjoining and restraining the defendant Fritz Scherk, pending the adjudication of this action, from prosecuting the arbitration proceeding instituted by defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

ALBERTO-CULVER COMPANY,
a Delaware Corporation,
/s/ *Francis J. Higgins*
Francis J. Higgins
One of Its Attorneys

Of Counsel:
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131
LAWRENCE, GOLDBERG, LAWRENCE & LEWIN
209 South LaSalle Street
Chicago, Illinois 60604
FR 2-1947

(Certificate of service omitted in printing.)

Exhibit B to Motion for Preliminary Injunction

EXHIBIT B

Translation Paris, November 9, 1971

INTERNATIONAL CHAMBER OF COMMERCE
ARBITRATION COURT
REQUEST

FOR: Mr. Fritz Scherk, domiciled in Geneva—1208 (Switzerland), 8 Rue Pedro Meylan, a German Citizen, hereafter called "Fritz Scherk"

Plaintiff

represented by Mr. Jacques KAM, Attorney at the Paris Court

AGAINST: Alberto-Culver Company, a corporation organized under the laws of the State of Delaware (USA), located and doing business at 2525 Armitage Avenue, Melrose Park, Illinois 60160, in the person of its legal representatives, hereinafter called "Alberto-Culver",

Defendant.

(Note of translator: Page 2 of the request is missing)

The price agreed upon, noted in section 1.2 of the Lodeva contract was an amount of German Marks 20,000, payable according to the schedule mentioned under B.

3. *By means of a contract dated February 12, 1969* (hereinafter called "Contract SEV" Fritz Scherk granted Alberto-Culver an irrevocable option for the purchase by AC, against several charges, clauses and conditions listed in said contract (see exhibit C) of the shares of a corporation to be organized under the laws of Liechtenstein (hereinafter called "AG") which he agreed to organize in ac-

cordance with said contract and which corporation would own the assets of Scherk Etablissement Vaduz (hereinafter called "SEV"), a corporate person of the Principality of Liechtenstein, as described in Article I, section 1.1 of the SEV contract.

The total price agreed upon in case of cancellation of the option, as described in paragraph 1 of article 1, sec. 1.2 of SEV contract was DM 8,200,000, of which DM 600,000 was to be paid in cash without restriction for the revision foreseen in said article and especially in sec. 1.7, the difference payable in installments; according to the conditions hereafter discussed under B.

4. In order to allow the formation of AG and to guarantee the transfer of the shares of AG to AC, the SEV contract provided for an escrow (Article 1, sec. 1.3 of SEV contract).

This disposition was put into effect through the signature of an Escrow Agreement of February 12, 1969 (hereinafter called "Escrow Agreement", enclosed as Exhibit D).

5. Finally, on February 11, 1969, a Consulting Agreement between AC and Fritz Scherk was signed (hereinafter called "Consulting Agreement" enclosed as Exhibit X), according to which Fritz Scherk was employed as a Consultant by AC for a period from April 1, 1969 to December 31, 1971, against payment of a lump sum of DM 1,000,000 and of a yearly salary of DM 4,000.

B—PAYMENT OF THE PRICE FIXED BY THE CONTRACTS

The payment of the cash part of the price was to occur after the signature of a new contract (hereinafter called "Closing Agreement"), the date of which was provided

for through the original contracts (FLS and Lodeva contracts, article I, sec. 1.3 and SEV contract, article I, sec. 1.5), according to a mechanism often used by American Corporations for the acquisition of industrial interests.

Concerning in particular the contract SEV, it should be remembered that it is question of an option.

The option having been exercised by AC, the cash part off the price (DM 600,000 without restriction for the revision foreseen in article I, sec. 1.7) became due at the date of the signature of the Closing Agreement.

As for the instalment part of the price, according to the terms of Article I, sec. 1.2(b) of the SEV contract, it was to be covered by four promissory notes signed by AC to the order of Fritz Scherk.

These promissory notes, with an interest rate of 7%, were to be presented for payment only after a period of 7 years from date of the signature of the Closing Agreement.

One only of these promissory notes (for an amount of DM 2,400,000 without restriction of reduction in the conditions provided in article I, section 1.8 of the contract) was negotiable as soon as in possession of Fritz Scherk, but only with the agreement of AC (article I, sec. 1.2 (i)).

The other three promissory notes, as per the terms of article I, sec. 1.2 (ii) were not negotiable, but only exchangeable through AC (at the expiration of a period of two, three and four years, respectively, from the date of the Closing Agreement) against new promissory notes for amounts which could be less than the amounts of the original promissory notes, under the conditions foreseen in article I, sec. 1.9 of the SEV contract, and the negotiability of which could be limited by the same restrictions as those mentioned for the first promissory note.

Exhibit B to Motion for Preliminary Injunction

The Closing Agreement, as foreseen by the above mentioned provisions of the different contracts, was signed by AC and Fritz Scherk on June 16, 1969.

As a result of this Agreement (hereinafter enclosed as exhibit E) which made effective the realization of the different contracts between the parties while adding some minor changes (without interest for this issue), Fritz Scherk received in payment a total amount of DM 2,080,360 made up of the following:

—contract FLS	DM	980,000
—contract LODEVA	DM	20,000
—contract SEV (after revision and deduction of certain amounts on the price)	DM	80,360
—Consulting Agreement	DM	1,000,000
Total	DM	2,080,360

Fritz Scherk also duly received the four promissory notes from AC according to the above conditions, covering the part of the price payable by instalment.

On the other hand, AC became owner of several assets and rights the transfer of which had been agreed upon.

• • •

CHAPTER III—CONCLUSION

Fritz Scherk, for the grounds discussed above and any other grounds to deduct or substitute, concludes that the Court shall:

1. Declare that AC has rescinded the contracts unilaterally on March 31, 1970.

2. Declare that this rescission was not founded.

Exhibit B to Motion for Preliminary Injunction

3. Give credit to Fritz Scherk for his repeated offer to restore to AC the entirety of the amounts and promissory notes received in execution of the contracts.

4. Declare that the rescission decided by AC and the offer of restitution made by Fritz Scherk compelled AC to make restitution spontaneously and immediately of the assets and rights received by them in execution of the contracts.

5. Consequently enjoin AC to return the said assets and rights and this under a daily penalty of DM 100,000.

6. Enjoin AC to complete the restitution by paying the amount of DM 2,500,000 as damages for the prejudice caused by the delay in making restitution.

7. As an alternative, if, as seems impossible, the Court would not order the restitution as requested by Fritz Scherk in paragraph 5 and 6 above, enjoin AC to restitute in the form of damages an amount, except to be completed of DM 199,998 plus interests, representing the promissory notes not paid by AC, increased by DM 2,500,000 as compensation for the prejudice caused by AC's delay to restore.

8. Enjoin AC to pay all the expenses of the arbitration, which will include namely the fees of the arbitrators, and all the related costs.

Under all reservation,

Made in Paris, November 9, 1971
in 3 copies.

Transcript of Proceedings of Monday, November 22, 1971

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

[1] TRANSCRIPT OF PROCEEDINGS had at the hearing * * * on Monday, November 22, 1971, at the hour of 10:00 o'clock a.m.

Present:

Messrs. Bell, Boyd, Lloyd, Haddad & Burns, by Mr. Francis J. Higgins,

and

Messrs. Lawrence, Goldberg, Lawrence & Lewin, by Mr. A. Charles Lawrence,

on behalf of plaintiff;

Messrs. Jenner & Block, by Mr. Robert F. Hanley,

on behalf of defendant.

* * *

[9] The Court: That is what I said earlier in the hearing, and that is why I asked Mr. Scherk—is that the way you pronounce it?

Mr. Hanley: Scherk, yes, your Honor.

The Court: Scherk is a defendant here and counsel has filed an appearance. I have personal jurisdiction at the moment. I may have to decide it otherwise as we get down to December—what is it?

Mr. Higgins: Your ruling date is now December 16, which is three days after our return date in Paris.

The Court: Now, counsel, why don't you—you have a right to have your say.

Mr. Hanley: Yes, your Honor. We had nothing to do with bringing this action. These parties agreed to dispose of their issues, any issues between them, any disputes between them by arbitration.

The only issue that is really pending between these parties is the manner in which they should go about effectuating a rescission of an acquisition of our company—our client's three companies—by Alberto-Culver. They had agreed to do this in Paris.

• • •

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

AFFIDAVIT
(Filed Nov. 24, 1971.)

STATE OF NEW YORK)
) ss
COUNTY OF NEW YORK)

Stuart Marks, being duly sworn, says:

1. I am an attorney duly authorized to practice in the State of New York and as such have represented Mr. Fritz Scherk, named as defendant herein.

2. In April and May, 1970, I visited attorneys representing Alberto-Culver in Chicago for the purpose of discussing the disputes involved herein and attempting to work out a settlement of them. A. Lawrence Goldberg, Esq., whom I understand to be special counsel (and now a director) of Alberto-Culver, participated in these con-

ferences and stated that if we could not arrive at a settlement, why then we would have to arbitrate in Paris, but that this would not be too unpleasant. He mentioned the fact that his wife had been born in Europe and that spending time in France would be no hardship.

3. In December, 1970, Mr. Scherk instituted a proceeding in Berlin for the purpose of preventing the removal from Berlin to Braunschweig of the Scherk business, which he was seeking to have Alberto-Culver restore to him. The Berlin court, in denying the relief sought, stated, among other things (page 9 of its opinion):

> "The application, agreed upon by the parties, of the law of the State of Illinois does not refer alone, as the plaintiff believes, to the decision of the arbitrator in accordance with Article IX, paragraph 4 of the purchase agreement of February 11, 1969. Arbitral decision is prescribed for the case of differences of opinion over claims arising out of the contract and of breach thereof. The establishment of the asserted defects in trademarks and the consequences thereof also is submitted to the decision of the arbitrator."

4. In a brief opposing preservational relief sought by Mr. Scherk in Liechtenstein against a wholly-owned subsidiary of Alberto-Culver, Dr. Peter Ritter, the Liechtenstein lawyer representing the wholly-owned subsidiary of Alberto Culver, stated:

> "(a) In this provision [Section 9.4 of the agreements of February 11 and 12, 1969] Fritz Scherk and the Alberto-Culver Company agreed, viz., on the exclusive jurisdiction, for all controversies or claims arising out of this contract or its breach, of the International Chamber of Commerce, Paris, France, as arbitral court. It is very questionable whether a judicial preservation proceeding [Sicherungsverfahren] is at all permissible when the basic claim can be decided only by the arbitral tribunal, so that as a prac-

tical matter, the justificatory complaint underlying the preservation decree [Sicherungsbot] could be initiated only in this arbitral court. This is, as mentioned, questionable if either a local court or a local arbitral court were to be occupied with the matter.

"(b) But such a preservation proceeding is absolutely inadmissible if the principal claim can be established only in a foreign arbitral court, whose decree is not enforceable locally. A decree of a French arbitral court is denied direct enforceability in Liechtenstein. The plaintiff bases his preservation claim on his claims against Alberto-Culver. These claims can be established only, as mentioned, in a French arbitral court. "For this reason the present preservation proceeding is inadmissible, as a consequence of lack of jurisdiction or inadmissibility". (Page 18)

5. The first steps for instituting the arbitration proceeding recently commenced in Paris by Mr. Scherk were taken in January, 1971, but the actual filing of the papers was delayed by difficulties of communication between the numerous countries involved.

/s/ *Stuart Marks*
Stuart Marks

(Jurat omitted in printing.)

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

ORDER

Date: November 24, 1971

Enter order of preliminary injunction enjoining the defendant, Fritz Scherk, from further prosecuting the arbitrator proceeding before the Court of Arbitration of the International Chamber of Commerce pending decision of this Court as to its jurisdiction (draft).

Order plaintiffs bond set at $5,000.00.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

ORDER FOR PRELIMINARY INJUNCTION

This cause coming on to be heard upon the Motion of plaintiff, Alberto-Culver Company, for a preliminary injunction restraining the defendant, Fritz Scherk, from prosecuting an arbitration proceeding instituted by defendant before the Court of Arbitration of the International Chamber of Commerce in Paris, France and the Court, having considered the pleadings, briefs of both parties and the affidavits and exhibits of record and having heard the argument of counsel for both parties:

THE COURT FINDS that:

1. The defendant has filed a Motion to Dismiss or Alternatively to Stay, supported by a brief and affidavits, which is currently under advisement by this Court. Plaintiff has filed a brief and affidavits in opposition to the motion. Said motion is set for ruling on December 16, 1971.

2. After the commencement of this action, the defendant has instituted arbitration proceedings before the Arbitration Court of the International Chamber of Commerce in Paris, France and those proceedings involve the same matters that are before this Court in this action.

3. This Court has the jurisdiction to determine its own jurisdiction and in aid thereof the Court has the power to restrain the defendant from prosecuting the arbitration proceeding pending the determination of this Court's jurisdiction:

IT IS HEREBY ORDERED that the defendant, Fritz Scherk, is enjoined and restrained from further prosecuting the arbitration proceeding which he has filed before the

Court of Arbitration of the International Chamber of Commerce pending the determination by this Court of its jurisdiction of this action.

Dated: November 24, 1971

/s/ William J. Lynch
William J. Lynch, Judge

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

REPLY AFFIDAVIT OF FRITZ SCHERK

(Filed Dec. 8, 1971.)

STATE OF SWITZERLAND)
) SS
CITY OF GENEVA)

Fritz Scherk, being first duly sworn on oath, deposes and says that:

1. When negotiations were resumed in Berlin in January and February 1968 on the initiative of Mr. Nadler and Mr. Meading on behalf of Alberto-Culver, the basis of the discussions was for the purchase of all my businesses including SEV. They were held in preparation of Mr. Lavin's visit to Berlin, at which the sale of all my commercial holdings to Alberto-Culver was to be finally and definitely decided upon. At Mr. Lavin's visit to Berlin, March 1968, he and I—in the presence of Mr. Nadler and Mr. Navon—reached full agreement upon the basic terms of this transaction, the sales-price and modalities of its payment, and decided definitely on it. As Mr. Lavin did not wish to buy my factory's land and premises at Berlin,

Kelchstr. 31, but rather have it leased to Alberto-Culver and as I wished to keep the Israel Scherk-business, these assets were excluded from sale, which, otherwise, covered all my international commercial rights, properties, assets and my name.

Immediately after agreement had been reached, Mr. Lavin called Mr. Friedel at the Alberto-Culver offices at Melrose Park over the Telephone and informed him, that he just had bought all the international Scherk-businesses– "but not the bricks"—"for U$ 2.150.000,00 as is, lock stock and barrel" and that he thought that this was a good deal.

Mr. Friedel replied that he thought so too and that Mr. Lavin had done a good job.

Mr. Lavin then demanded from me that I cease and terminate any and all negotiations for the sale of my businesses with other prospective buyers, I was then conducting, as Alberto-Culver was, now, definitely "the buyer". We, then, brought Mr. Lavin to the Berlin airport where, with a symbolic handshake, the deal was solemnized.

2. Subsequent to that Berlin-meeting of March 1968 on the sale of my businesses to Alberto-Culver, divergencies of opinion arose as to the interpretation and computation of the sales-price's payment modalities in relation with non-cash and contingencies payments. This matter was extensively discussed in Berlin and London with Mr. Nadler, Chief negotiator of Alberto-Culver through-out until the final closing. Mr. Nadler, stating that only Mr. Lavin personally could and would decide on such a matter relating to a transaction he himself had decided upon, suggested a personal meeting between Mr. Lavin and me, at which this problem, surely, would resolved.

It was in reply to Mr. Lavins letter of April 9, 1968 that I wrote my letter of April 30, 1968 to Mr. Lavin (Exhibit A, Lavin-affidavit), and shortly afterwards, in the morning of May 7, 1968, I received a telegramm from my legal counsel Mr. Stuart Marks, from New York, reading as follows:

> LAVIN HAS WRITTEN SCHERK SUGGESTING MEETING UNITED STATES STOP I TENTATIVELY ARRANGED WITH HIM FOR MORNING MAY TWENTYSECOND STOP LAVIN FEELS SCHERK SHOULD BE PRESENT STOP LETTER FOLLOWS
>
> MARKS

This telegramm or rather a photostat copy of it is attached hereto as EXHIBIT I.

The letter following this telegramm, of May 7, 1968, addressed to my General Representative and Attorney, Mr. Navon, at my Berlin business' adress, from Mr. Marks, is attached hereto as EXHIBIT II. Also in photostat copy.

A meeting to resolve the problem of the divergencies on the payment modalities regarding the sales-price's computation in relation to the non-cash-and-contingencies terms, agreed upon at the March 1968 Berlin meeting was, thereupon, arranged for May 1968 at Melrose Park, Illinois, U.S.A.

3. The meeting at Melrose Park, May 22-25, 1968, at which Mr. Navon and my wife also attended, then settled these divergencies, and in a private meeting with Mr. Lavin alone I agreed upon the modalities and computation of the sales-price's payment under the terms and conditions and in relation with the Promissory Notes and the contingency

which we discussed. Mr. Lavin emphasized during that discussion "under 4 eyes" that, as head of our businesses, only he and I were the men to decide, as we had done in Berlin, when we made the deal. I understood my view with his previous understanding and interpretation of non-cash-and-contingency computation, the agreed upon sales-price would have been substantially reduced, and the settlement brought about by this frank and outspoken discussion was satisfactory to me. It was, again and in the presense also of Mr. Friedel, solomnized with a handshake.

When mentioning, later, that I owned trademarks which I held "in reserve stock" in accordance with the possibilites provided for by the European trademark and patent-right laws, regulations and usances and which were not or little used, Mr. Lavin stated, that what he was interested in was a good brand-name, goodwill, public acceptancy of that, drawing power and sales-development possibilites and that he expected SCHERK and the wide distribution of Scherk-products internationally plus the Scherk-organisations would provide Alberto-Culver with all that and the possibility to develop sales and marketing of Alberto-Culver products in Europe.

When the parsel with copies of all my trademark registrations arrived, airmailed to Melrose Park by my secretary, Mrs. Dorsch, not one of the Alberto-Culver officials, nor Mr. Lavin took a look at them.

4. After the Melrose Park meeting extensive and detailed negotiations ensued in Europe with Mr. Nadler, Mr. Walter Treumann and other authorised agents and experts acting on behalf of Alberto-Culver, such as, for instance, Mr. Jordan, Chief chemist of Alberto-Culver on formulae manufacturing,—Messrs. Peat, Marwick, Mitchell & Co., for

accountancy, finances, computation, calculations and examinations thereto,—Messrs. Pattishall, McAuliffe & Hofstetter and Messrs. Bussmann (of Hamburg) on trademarks, patentrights—?—usances and examinations thereto, ect.;—all in relation to my businesses and their sale to Alberto-Culver. These negotiations and examinations, which were held exclusively in Europe, lasted, practically, until the closing of all the agreements, March, resp. June 1969.

5. The four Promissory Notes were delivered to me at this final closing of the (consolidated) sales-and-other-agreements (Escrow agreement, consultation agreement, FLS & SEV—agreements under the Closing agreement) on June 17 or 18, 1969., in Geneva, Switzerland, by Mr. Walter Treumann and Mr. James Nadler on behalf of Alberto-Culver, and it was there and then, that I signed the receipt of them (Exhibit A of the Judelson Affidavit).

6. "Scherk Etablissement Vaduz" (SEV), under Liechtenstein law was an "Establishment" and not a corporation. I held no shares or securities, but paid in the required capital, so that, when this Establishment was founded, May 25, 1954, I was registered as "Founder", which is also shown in its statutes. It was at the express demand and requirement of Alberto-Culver that, for the purpose of acquiring SEV, I was required to alter the the status of SEV and to form a corporation at the offices of "Prāsidial Anstalt Vaduz", a lawyer firm chosen by Alberto-Culver at Vaduz, Liechtenstein. I, there, signed the documentation put before my by Alberto-Culver's lawyer, Mr. Töndury, so that "Scherk-Enterprises V A.G.", a corporation (Aktiengesellschaft) was founded and "Scherk Etablissement Vaduz", consequently, struck from the Liechtenstein registry. This name was chosen by Alberto-Culver to preserve the well

known abriviation of "S E V". I never was in possession of nor did I see any shares of securities of SEV-A.G., as these, under the Escrow-agreement, were immediately placed under escrow and delivered to Alberto-Culver directly, at the final closing, by the Escrow Agent nominated by them.

7. I deny that the representations on trademarks set forth in the Complaint are false or misleading.

8. Of the persons named in § 12 of the Lavin-Affidavit I know only:

(a) James Nadler
(b) Robert Silver (on December 2, 1971 at Chicago)
(c) Fred Meading
(g) E.C. Friedel
(j) Walter Treumann
(n) Karlheinz Quack, attorney at law in Berlin

9. The price for my German business offered by Mr. Lavin at his meeting with Mr. Navon, at Melrose Park, December 1967, was less than U$ 250.000.

10. The persons who took part, on my behalf, in the negotiations and discussions which preceded the execution of the acquisition agreements and who would, eventually, have to attend or otherwise participate in proceedings on the Complaint are:

Mr. B. Navon, my General Representative and Attorney, Israel
Mr. St. Marks of Kaye, Scholer, Fierman, Hays & Handler, N.Y.
Mr. B. Neubert, lawyer and trademark cousel, Berlin
Dr. H. Bronner, Wirtschaftsprufer, lawyer and finance expert, Berlin
Mr. Stocklossa, of Messrs. Drs. H. Brönner, Berlin

Mr. Kröger, of Messrs. Drs. H. Bonner, Berlin
Dr. H. Fincke, trademark counsel and patent agent, Munich
Mr. Staeger, of Fincke, Bohr & Co. Patent agents, Munich
Mr. Thornton, of Thornton & Thornton, Patent lawyers, London
Mr. A. Eder, tax-and-finance expert. Vienna
Dr. P. Marxer, lawyer, Vaduz
Dr. G. Batliner, lawyer, Vaduz
Mr. Pfundt, lawyer, Berlin
Mr. Lucius of Berliner Handelsgesellschaft, banker, Berlin
Mr. Kohnert of Berliner Discontobank, banker, Berlin
Mr. Bonte of Berliner Industriebank, banker, Berlin
Mr. W. Matthess, owner of Dorland Advertising Agency, Berlin
Mr. H. Beutter, procurist and manager, Scherk Vienna
Mr. Lehrer, sales manager, Scherk Berlin
Mrs. Haas, procurist, Scherk Berlin
Mrs. Dorsch, secretary, Scherk Berlin
Mrs. Kauffmann, Directrice, Scherk Berlin
Mrs. Lesch, manufacturing manager, Scherk, Berlin
—my former employes and responsible officials and such experts as may be required.

/s/ *Fritz Scherk*

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISON

(Title omitted in printing.)

AFFIDAVIT OF STUART MARKS

(Filed Dec. 8, 1971.)

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

Stuart Marks, being duly sworn, says:

1. I am an attorney duly authorized to practice in the State of New York and as such have represented Mr. Fritz Scherk named as defendant herein.

2. I attended conferences which took place at the offices of Alberto-Culver in Melrose Park, Illinois between May 22 and 25, 1968 and was present at the conference at which Mr. Scherk discussed his European business with Mr. Lavin, President of Alberto-Culver. Mr. Lavin stated that he was interested in the Scherk business because Alberto-Culver had had difficulty getting its products on to the German market, and Scherk was apparently well known in that market. He stated that he had two ways to get Alberto-Culver products on to the German market: he could either spend the necessary money in advertising and promotion or he could use the Scherk business as a means of launching Alberto-Culver products. He stated that if he took the latter approach, he could afford to pay Mr. Scherk what it would otherwise cost for the advertising and promotion and that if the Scherk business itself turned out to be profitable, he could pay Mr. Scherk a portion of the profits.

There was no mention of trademarks other than Mr. Scherk's brief allusion to the fact that Scherk enterprise

owned marks. The conference was devoted to a discussion of price and Mr. Lavin's own ideas on it, including the explanation given above.

3. I attended a meeting on Sunday, December 8, 1968 in the offices of Pattishall, McAuliffe and Hofstetter, Prudential Plaza, Chicago. The purpose was to discuss various trademark questions raised by Mr. Silver and attorneys in the Pattishall firm, following which I was to go to Europe to obtain further information on this subject. I did not make the statement which Mr. Silver attributes to me in his affidavit of October 1, 1971.

4. The business of Mr. Scherk conducted from Liechtenstein had for many years been operated as an Anstalt (establishment) which did not use negotiable stock or certificates as indicia of ownership, for transfer, or for any other purpose, and at no time had shares outstanding. The attached copy of an extract from the Vaduz Commercial Register, evidencing the existence of the Anstalt (Exhibit A), expressly states that the capital consisted of 10,000 Swiss francs fully paid in cash and not divided into shares. The statutes of the Anstalt (Exhibit B) expressly provide, in Article 5, that the capital of the Anstalt is not and must not be divided into shares. (A translation of the statutes is annexed hereto as Exhibit C).

Article 541 of the Liechtenstein Personen- und Gesellschaftsrecht provides that an Anstalt can have shares and certificates only if its statutes so provide. As I have mentioned above, the statutes of the Scherk Anstalt expressly prohibited the creation of shares. A copy of Article 541 is annexed hereto as Exhibit D, and a translation of Article 541 is annexed hereto as Exhibit E.

5. It was only as a result of the agreement of February 12, 1960, relating to sale of the Liechtenstein business,

that the Anstalt was changed into a stock corporation. This agreement contained a requirement, inserted at the insistence of Alberto-Culver for their tax reasons, that the Anstalt be converted into a stock corporation.

In order to accomplish the transformation, Fritz Scherk entered into an escrow agreement dated February 12, 1969 (Exhibit F) with Alberto-Culver's attorneys (Praesidial-Anstalt Vaduz). In this agreement, Mr. Scherk irrevocably assigned to Alberto-Culver's attorneys all his rights as owner of the Anstalt and he further evidenced this by executing and delivering to Alberto-Culver's attorneys a deed assigning them his ownership of the Anstalt. He also delivered to them a stock power in blank so that when they had completed the transformation, they would have in their hands full ownership of the resulting corporation. The transformation of the Anstalt took place on February 26, 1969.

6. There were four elements in the transactions between Mr. Scherk and Alberto-Culver, namely, a consulting agreement between Alberto-Culver Company and Fritz Scherk dated February 11, 1969 containing a ten-year covenant against competition (to which the agreement assigns a price of DM 1,000,000), the purchase of the Liechtenstein business (referred to above), the purchase of Mr. Scherk's proprietorship in Berlin (including obtaining a lease from Mr. Scherk of the premises in which the Scherk production facilities were located), and the purchase of Lodeva. Lodeva was an inactive company for which Alberto-Culver paid Mr. Scherk DM 20,000 (approximately $5000). Lodeva owned no trademarks.

/s/ *Stuart Marks*
Stuart Marks

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

(Title omitted in printing.)

ORDER

Date: December 22, 1971

The defendant's motion to dismiss is hereby denied. The Court finds that the complaint states a cause of action under the Securities Exchange Act of 1934, 15 U.S.C. §78j. The Court further finds that service of process on defendant, Scherk, was properly effected and that the "minimal contacts" requirement of the due process clause has been satisfied. Therefore, the Court has jurisdiction over both the subject matter of the complaint and over the person of the defendant, Scherk. Further, the Court finds that the doctrine of forum non conveniens is inapplicable to the instant action. Defendant's motion to stay these proceedings pending the pursuit of arbitral remedies before the International Chamber of Commerce is denied. *Wilko* v. *Swan, et. al.*, 346 U.S. 427 (1953). Finally, it is ordered that the plaintiff's claims for punitive damages for alleged violations of the Securities Exchange Act of 1934 be stricken. Defendant is given 20 days to answer or otherwise plead.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

(Title omitted in printing.)

MOTION FOR RENEWED PRELIMINARY INJUNCTION RESTRAINING PROSECUTION OF ARBITRATION PROCEEDING

(Filed Jan. 12, 1972.)

NOW COMES the plaintiff Alberto-Culver Company and respectfully moves this Court for an Order of Preliminary Injunction enjoining and restraining the defendant Fritz Scherk, pending the final adjudication of this action, from prosecuting the arbitration procedings heretofore instituted by said defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

In support of this Motion plaintiff alleges that:

1. On November 24, 1971, this Court entered an Order of Preliminary Injunction enjoining and restraining the defendant from prosecuting the Paris arbitration proceedings pending this Court's determination of its jurisdiction.

2. On December 22, 1971, the Court entered its order denying defendant's Motion to Dismiss or Alternatively to Stay and finding that jurisdiction existed over the subject matter of the action and the person of the defendant.

3. Under the Securities Exchange Act of 1934 the Court's jurisdiction of this case is exclusive.

4. The points and authorities supporting this Motion are set forth in plaintiff's Brief in Opposition to defen-

dant's Motion to Dismiss and in plaintiff's Brief in Support of its earlier Motion for Preliminary Injunction.

5. Renewal of the Preliminary Injunction is necessary to protect this Court's exclusive jurisdiction and to prevent defendant from prosecuting the arbitration proceedings which are still pending and which concern the same controversy as that presented here.

Alberto-Culver Company,
Plaintiff
/s/ *Francis J. Higgins*
Francis J. Higgins
Its Attorney

Of Counsel
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131

LAWRENCE, GOLDBERG, LAWRENCE & LEWIN
209 South LaSalle Street
Chicago, Illinois 60604
FR 2-1047

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing.)

[1] TRANSCRIPT OF PROCEEDINGS had in the hearing * * * on Friday, January 14, 1972, at the hour of 10:00 o'clock a.m.

Transcript of Proceedings of January 14, 1972

Present:

Messrs. Bell, Boyd, Lloyd, Haddad & Burns, by Mr. Francis J. Higgins,

and

Messrs. Lawrence, Goldberg, Lawrence & Lewin, by Mr. A. Charles Lawrence,

on behalf of plaintiff;

Messrs. Jenner & Block, by
Mr. Robert F. Hanley and
Ms. Lynn E. McNown,

on behalf of defendant.

• • •

[7] The Court: Except there was a provision in the preliminary injunction that it would fall upon my decision on the question of the jurisdiction of this court.

Mr. Hanley: Right. As far as I'm concerned, there is no—and I think Mr. Higgins agrees—there is no injunction in force at this time. So, he has now filed another motion for preliminary injunction, which has now been briefed and submitted to your Honor. I understood we were going to have—maybe I'm wrong, but I understood we were going to have a further hearing on that on Monday of next week. I guess there was no date.

Mr. Higgins: Your Honor, counsel's statements are of great concern.

If I understand what he's saying now, he is asking your Honor to exercise your discretion not only to certify, which is one issue, but secondly, quite explicitly in his motion, to stay these proceedings here pending this discretionary review by the Court of Appeals, while at the same time say-

ing that he intends to go ahead, or at least that he has the right to go ahead in Paris, simply during that period of delay.

[8] Now, the question of the earlier injunction was fully briefed and argued, and it was issued pending the court's power to determine its jurisdiction. The court ruled that it did have such jurisdiction, so that the question of the present injunction is simply one of updating in the light of the court's December 22, 1971 ruling.

If Mr. Hanley is now saying that he, on the one hand, can tie things up here on a discretionary basis, pending appeal, while prosecuting us in Paris, he is using this procedural device of review to achieve the very thing which the court has held he is not empowered to do.

The Court: Is that what you intend to do, Mr. Hanley?

Mr. Hanley: No, your Honor.

As a matter of fact, he has a motion for preliminary injunction pending. I don't think he is entitled to it. We have made arguments on that point.

The Court: If you say he is not entitled to it, then you intend to proceed in Paris, don't you?

[9] Mr. Hanley: If the Court denies his motion for injunction, we would certainly proceed in Paris.

The Court: All right, that's an honest forthright answer from you.

Mr. Hanley: As we believe we have the right to do under the arbitration clause of the agreement.

The Court: Surely.

• • •

Order

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

ORDER

Date Jan. 14, 1972

Enter order granting defendants motion for Certification to the Circuit Court of Appeals pursuant to 28 U.S.C. sec. 1292(b).

Enter order of preliminary injunction pursuant to the terms of the draft order entered herein. (draft)

Enter order approving preliminary injunction bond in the amount of $7,500. (draft)

/s/ *WJL*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ALBERTO-CULVER COMPANY, a Delaware corporation, Plaintiff,

v.

FRITZ SCHERK, Defendant.

No. 71 C 1414

ORDER OF PRELIMINARY INJUNCTION

This cause coming on to be heard upon the Motion of plaintiff for a Renewed Preliminary Injunction enjoining defendant from prosecuting arbitration proceedings instituted by him against plaintiff before the Court of Arbi-

tration of the International Chamber of Commerce in Paris, France, and the Court having heard argument thereon and being fully advised in the premises,

DOES FIND:

1. In November, 1971, while this Court was considering defendant's Motion to Dismiss or Alternatively to Stay, defendant instituted arbitration proceedings against plaintiff before the aforesaid International Chamber of Commerce which proceedings involved the same controversy which is before the Court in this case.

2. On November 24, 1971, this Court, after briefing and argument, entered an Order of Preliminary Injunction enjoining the defendant from prosecuting said arbitration proceedings pending this Court's determination of its jurisdiction.

3. On December 22, 1971 this Court entered its order denying defendant's Motion to Dismiss or Alternatively to Stay and finding that this Court has jurisdiction over the subject matter and of the person of defendant.

4. This Court has exclusive jurisdiction of this controversy under the Securities Exchange Act of 1934.

5. It is necessary that an Injunction be issued to protect this Court's jurisdiction of this action and to prevent the irreparable harm which would result from preemption of this Court's exclusive jurisdiction by defendant's proceeding before said International Chamber of Commerce.

IT IS THEREFORE ORDERED that the defendant Fritz Scherk be and he hereby is enjoined and restrained, pending review of this Court's order dated December 22, 1971 by the United States Court of Appeals for the Seventh Circuit, from prosecuting the arbitration proceeding instituted by defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France. Plaintiff shall post a Preliminary Injunction

Bond in the amount of Seven Thousand Five Hundred Dollars ($7,500.00).

/s/ *William J. Lynch*
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 71 C 1414

ALBERTO-CULVER COMPANY, Plaintiff,

vs.

FRITZ SCHERK, Defendant.

MEMORANDUM OF DECISION

January 17, 1972

(The Memorandum of Decision is printed at pages App. 18 - App. 33 of the Petition For A Writ Of Certiorari.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

AMENDED ORDER

The defendant's motion to dismiss is hereby denied. The Court finds that the complaint states a cause of action under the Securities Exchange Act of 1934, 15 U.S.C. §78j. The Court further finds that services of process on defendant, Scherk, was properly effected and that the "minimal contacts" requirement of the due process clause

has been satisfied. Therefore, the Court has jurisdiction over both the subject matter of the complaint and over the person of the defendant, Scherk. Further, the Court finds that the doctrine of *forum non conveniens* is inapplicable to the instant action. Defendant's motion to stay these proceedings pending the pursuit of arbitral remedies before the International Chamber of Commerce is denied. *Wilko v. Swan, et al.*, 346 U.S. 427 (1953). Finally, it is ordered that the plaintiff's claims for punitive damages for alleged violations of the Securities Exchange Act of 1934 be stricken.

The Court is of the opinion that this order involves controling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of thislitigation. It is ordered that all proceedings herein be stayed pending determination of the appeal of this order by the United States Court of Appeals for the Seventh Circuit.

Dated: January 14, 1972.

Enter:

/s/ *William J. Lynch*
William J. Lynch, Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

NOTICE OF APPEAL

Notie is hereby given that Fritz Scherk, defendant above-named, hereby appeals to the United States Court of Apeals for the Seventh Circuit from the Order Of

Preliminary Injunction entered in this action on the 14th day of January, 1972, and from the Minute Order entered in this action on the 22nd day of December, 1971 which in part denied defendant Scherk's motion to stay proceedings in this action pending arbitration of this matter before the International Chamber of Commerce.
Dated: January 21, 1972.

/s/ *Lynne E. McNown*
One of the Attorneys for Defendant
Fritz Scherk

Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603
641-6060

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 72-1158

ALBERTO-CULVER COMPANY,
Plaintiff-Appellee,

vs.

FRITZ SCHERK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION

August 2, 1973

(The Opinion is printed at pages App. 1 - App. 17 of the Petition For A Writ Of Certiorari.)

Order

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
August 2, 1973

No. 72-1158

ALBERTO-CULVER COMPANY, a Delaware Corporation,

Plaintiff-Appellee,

vs.

FRITZ SCHERK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

(SEAL)

Order

In the

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

(Title omitted in printing.)

October 18, 1973.

ORDER

On consideration of the petition for rehearing and sug
gestion that it be heard *en banc* filed in the above-entitl
cause, no judge in active service having requested a vo
thereon, nor any judge voted to grant the suggestion, an
all of the members of the panel having voted to deny
rehearing,

IT IS ORDERED that the petition for a rehearing i
the above-entitled cause be and the same is hereby denie

Supreme Court of the United States

No. 73-781

Fritz Scherk,

Petitioner,

v.

Alberto-Culver Company

ORDER ALLOWING CERTIORARI. Filed January 21 ----------, 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ----------Circuit is granted.

FILE COPY

No.

FILED

NOV 15 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

FRITZ SCHERK,

Petitioner,

VS.

ALBERTO-CULVER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Fritz Scherk hereby petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 2, 1973.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit are not yet officially reported. The opinions are unofficially reported, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,092, and are printed in the Appendix at pages App. 1-App. 17. The opnion of the United States District Court for the

Northern District of Illinois, Eastern Division, is not reported either officially or unofficially and is printed in the Appendix at pages App. 18-App. 33.

JURISDICTION

The Seventh Circuit's judgment was entered on August 2, 1973. (App. 34.) Petitioner's timely petition for rehearing was denied on October 18, 1973. (App. 35.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether unambiguous contractual provisions requiring arbitration of an international commercial dispute, which provisions were the result of arms-length bargaining by sophisticated businessmen and lawyers, are unenforceable merely because a claim, as yet not proven, has now been made that the Securities Exchange Act of 1934 has been violated.

STATUTES INVOLVED

The statutes involved herein are the Federal Arbitration Act, 9 U.S.C. §§2, 3, 201, 202, 206, and 208, and the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a). The text of these provisions are reproduced in the Appendix at pages App. 36-App. 38.

STATEMENT OF THE CASE

Respondent Alberto-Culver Company brought this action charging that Mr. Scherk breached certain contract warranties and violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j (b), Rule 10b-5 promulgated pursuant thereto, and common law. Jurisdiction of the District Court was predicated upon Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. § 1332.

Alberto-Culver is a Delaware corporation which manufactures and distributes toiletries and hair products in national and international markets. Mr. Scherk is a German citizen, residing in Switzerland, who, prior to the dealings with Albert-Culver was in the business of manufacturing and selling cosmetics in Europe. Mr. Scherk owned three businesses: Firma Ludwig Scherk ("FLS"), a German sole proprietorship which manufactured cosmetics; Scherk Establissement Vaduz ("SEV"), a Liechtenstein business entity with no counterpart in the United States, which licensed trademarks for cosmetics on an international basis; and Lodeva Herstellung und Vertrieb kosmetischer Artikel Gmbh ("Lodeva"), a dormant German business entity with no counterpart in the United States.

Interested in gaining an entree into the European market, Alberto-Culver contacted Mr. Scherk in Germany in June of 1967 to explore a possible acquisition of his European cosmetic business. Protracted negotiations ensued, resulting in Alberto-Culver's acquisition of FLS, SEV and Lodeva. Alberto-Culver conducted an exhaustive examination of the businesses, including an audit by Peat, Marwick, Mitchell & Co. The closing took place in June, 1969. Alberto-Culver acquired the assets of FLS and all of Scherk's interest in Lodeva. As to SEV, Alberto-Culver specified which assets it was buying, but for tax purposes required that the acquisition take place as a sale of stock. Therefore, SEV was transformed into a stock company by Alberto-Culver's attorneys acting as escrow agents. Alberto-Culver paid Scherk cash and delivered four promissory notes. The one negotiable note may not be negotiated without prior approval by Alberto-Culver and is restricted as to whom it may be sold or transferred. (Mr. Scherk has found that

he cannot sell that note to any Swiss banks.) The other three notes are by their terms non-negotiable and must be surrendered to Alberto-Culver.

In the FLS and SEV contracts, Alberto-Culver and Mr. Scherk specifically agreed that any and all disputes arising concerning the transactions were to be arbitrated before the International Chamber of Commerce ("ICC") in Paris, France.* In 1970, Alberto-Culver concluded that Mr.

---

* The FLS contract provides:

"The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

The SEV contract provides:

"The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by

Scherk had breached his contractual warranties as to the trademarks owned by FLS and SEV. Instead of instituting arbitration as required by the contracts, Alberto-Culver brought suit in the United States District Court in Chicago. Mr. Scherk moved in the District Court, pursuant to 9 U.S.C. §3, for an order staying these proceedings pending arbitration, and he instituted arbitration before the ICC in Paris. The District Court denied the requested stay and enjoined Mr. Scherk from proceeding with arbitration before the ICC. Mr. Scherk appealed both of these orders. The Seventh Circuit panel hearing the case affirmed, Judge Stevens dissenting.

(footnote continued)

each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The law of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

REASONS FOR GRANTING THE WRIT

This is an important case of first impression. The Seventh Circuit has concluded that the mere filing of a claim that the Exchange Act has been violated is sufficient to nullify explicit contractual provisions requiring arbitration of an international commercial dispute. The Seventh Circuit's decision is in flat contradiction to declared Congressional policy, 9 U.S.C. §201 *et seq.*, and principles concerning international commercial transactions recently enunciated by this Court in *M. S. Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Given the almost limitless expanse of commercial conduct now being covered by federal securities law, this opinion will have widespread, detrimental and wholly unexpected effects on international commerce. Thus, this case involves an issue of exceptional importance meriting review by this Court.

A. The Decision Below Effectively Nullifies Chapter Two Of The Federal Arbitration Act.

In 1970, having considered the appropriateness of, and the benefits to be gained from, arbitration in the international context, Congress enacted Chapter 2 of the Federal Arbitration Act. 9 U.S.C. §201 *et seq.* Chapter 2 provides that an international commercial contract providing for arbitration is enforceable and irrevocable. 9 U.S.C. §§202, 208. The courts of the United States are to compel such arbitration proceedings. 9 U.S.C. §§206, 208. The panel majority in the decision below completely ignored the applicable and controlling provisions of the Federal Arbitration Act and the declared national policy contained therein. In effect, the panel's decision nullifies the Federal Arbitration Act vis-a-vis a vast number of international commercial transactions.

B. The Decision Below Conflicts With This Court's Recent Decision Regarding International Commercial Transactions.

The panel majority's decision conflicts with the controlling policy considerations enunciated by this Court in *M. S. Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

In *Zapata,* this Court determined that, in *international* commercial matters, agreements as to choice of forum are valid and will be enforced. This is so even if the foreign tribunal will enforce contractual, exculpatory clauses which are contrary to the domestic policy of this country. This Court concluded that forum-selection clauses

> "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." (Footnote omitted.) 407 U.S. at 10.

This, the Court noted, is particularly so when, as in the instant case, the agreement is the result of arm's-length bargaining by sophisticated businessmen. 407 U.S. at 12. In the case at bar, there has been absolutely no showing that enforcement of the arbitration provisions would be in any way unreasonable. The policy considerations relating to international commerce which dictated enforcement of the forum selection clause in *Zapata* apply with equal force to the issue of enforcing the arbitration clauses in the case at bar.

C. The Wilko Decision Should Be Re-Examined In Light Of The Requirements Of International Commerce.

The only authority for the position of the panel majority is *Wilko* v. *Swan,* 346 U.S. 427 (1953), wherein this Court was interpreting §14 of the Securities Act of 1933, 15 U.S.C.

§77n. *Wilko* decided that, in controversies under the Securities Act, agreements to arbitrate future disputes are unenforceable. Since the language of §29(a) of the Exchange Act, 15 U.S.C. §78cc(a), is similar to that of §14 of the Securities Act, courts have applied *Wilko* to Exchange Act cases.

As Judge Stevens notes in his dissenting opinion (App. 15), the *Wilko* result is not required by the express language of §14; instead, this Court was actually extending the ambit of §14. Moreover, *Wilko* was decided solely in a domestic context without any consideration of the requirements of international commerce. Since that 1953 decision, Congress enacted Chapter 2 of the Federal Arbitration Act and this Court decided the *Zapata* case. Judge Stevens stated in his dissenting opinion:

> "... I consider it plain that the policy of the 1934 Act would not be thwarted by enforcing this agreement, whereas the strong countervailing policy identified by the Chief Justice in *Zapata* will be compromised if it is not enforced." (App. 16, n.13.)

Furthermore, the *Wilko* result was largely influenced by the fact that the parties there were of quite different bargaining strength, that is, purchasers of securities dealing with brokerage houses. See 346 U.S. at 435. Here, the arbitration agreement was reached through arm's-length bargaining between sophisticated businessmen. As Judge Stevens said (App. 17):

> "[t]he dispute between these parties over the alleged shortage in defendant's inventory of European trademarks, a matter covered by contract warranties and subject to pre-closing verification, is the kind of commercial dispute for which arbitration is entirely appropriate."

D. This Case Should Be Reviewed By This Court Because The Seventh Circuit's Decision, If Left Standing, Will Have Wide-Ranging, Unexpected, Indeed Detrimental Effects Upon International Commercial Transactions.

The effect of Seventh Circuit's decision is that, in international commercial transactions as long as securities are involved in some way, the parties cannot rationally decide in advance to arbitrate future disputes. Thus, the parties are forbidden to add this element of certainty and specificity to their transactions and are precluded from choosing in advance to resolve their disputes inexpensively and expeditiously by arbitration, rather than litigation.

The broad sweep of this decision can only be appreciated by an understanding of the vast scope of the definition of "security." Section 3(a)(10) of the Exchange Act, 15 U.S.C. §78c(a)(10), defines security as:

> "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

Thus, securities in some form are present in a great variety and a vast number of international commercial transactions.

As this Court stated in *Zapata*:

> "[f]or at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . *We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.*" (Emphasis added.) 407 U.S. at 8-9.

As Judge Stevens noted (App. 10):

> "[a]n excessively paternalistic attitude toward American overseas investment will inevitably make American capital less attractive to foreign firms."

This Court has recognized that, in international commercial dealings, the method of and forum for, handling possible future disputes is a proper subject of bargaining, a term which is likely to effect the price of the transaction, and, more importantly, a term without which there may be no transaction at all. This Court stated:

> "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an *indispensable element* in international trade, commerce and contracting." (Emphasis added.) 407 U.S. at 13-14.

Not only will the effects of the panel's decision hinder development of American overseas trade and commerce, it adversely affects the credibility of American business. In plain English, Alberto-Culver agreed to arbitrate in Paris before the ICC. Now after the fact, while it is suing Mr. Scherk on the very contracts in issue, Alberto-Culver says that it has an absolute right to renege on its commitments. This Court should consider whether our judicial system is going to let sophisticated American businesses go abroad, make solemn contracts with foreigners and then renege on their commitments.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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PROOF OF SERVICE

ROBERT F. HANLEY, on oath deposes and states that on the 14th day of November, 1973, three copies of the Petition for a Writ of Certiorari were served by first class mail, postage prepaid, on Francis J. Higgins, at 135 South LaSalle Street, Chicago, Illinois 60603, and that all parties required to be served have been served.

/s/ ROBERT F. HANLEY
One IBM Plaza
Chicago, Illinois 60611
Attorney for Petitioner

Subscribed and sworn to
before me this 14th day
of November, 1973.

.....
Notary Public

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 72-1158

ALBERTO-CULVER COMPANY, a Delaware corporation,
Plaintiff-Appellee,

vs.

FRITZ SCHERK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION

August 2, 1973

Before STEVENS, *Circuit Judge,* GRANT, *Senior District Judge,* and GORDON, *District Judge.*

GORDON, *District Judge.* This is an interlocutory appeal. The district court found that it had jurisdiction over both the parties and the subject matter of this lawsuit. Also, the district court refused to stay the proceedings before it while the parties arbitrated their dispute before the International Chamber of Commerce tribunal in Paris,

France. The court enjoined the parties from such arbitration.

The appellee urges that the findings and order of the district court are not appealable under 28 U.S.C. § 1292 (a)(1) and has moved for dismissal of the appeal. For the reasons set forth in this opinion, we find that this court may properly entertain the appeal, and we affirm the decision of the district court.

The plaintiff-appellee, Alberto-Culver (Alberto) is a Delaware corporation with its principal offices situated in Illinois. It manufactures and distributes toiletries and hair products in national and international markets.

The defendant-appellant, Fritz Scherk (Scherk) is a German citizen who presently resides in Switzerland. Prior to the transactions here in issue, Scherk was engaged in the manufacture and sale of cosmetic products for sale in western Europe. The principal manufacturing operations were conducted by Scherk in facilities situated within Berlin, Germany, and owned by Scherk through a sole proprietorship called Firma Ludwig Scherk (FLS).

Scherk also owned interrelated business entities known as Scherk Establissement Vaduz (SEV), a Liechtenstein entity which has no counterpart in the United States, and Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH (Lodeva), a German entity which has no counterpart in the United States. SEV was operated by Scherk as a holding company licensing the sale and distribution of Scherk's cosmetics on an international basis under a variety of trademarks. The Lodeva entity was dormant and remains so.

In June, 1967, Alberto contacted Scherk in Germany to explore the possibility that Scherk might sell his

European cosmetic business. In November, 1967, Fred Maeding of Alberto visited Scherk in Germany to pursue negotiations for such acquisition. In December, 1967, Alberto's president, Leonard H. Lavin, met with Scherk's representative, Benjamin Navon, in Chicago, Illinois. The negotiations were terminated.

In February, 1968, Alberto contacted Scherk in Berlin and negotiations were resumed. An agreement in principle was reached at this time concerning the basic terms for Alberto's acquisition of Scherk's business entities, SEV, FLS, and Lodeva; the details of the agreement were hammered out in Melrose Park, Illinois, during a 3-day meeting held in late May and early June, 1968. Scherk was present in Illinois for this latter meeting. A written document was ultimately prepared and signed in Vienna, Austria, by Scherk in February, 1969.

Among other things, the agreement between Alberto and Scherk provided that SEV was to be converted to a stock corporation and that Alberto was to acquire 100% of the stock of the new corporation. Accordingly, the parties entered into an escrow agreement by which Scherk assigned all of his rights in SEV to the escrow agent who was to accomplish the conversion and hold the certificates until closing.

The agreement also provided that as to the acquisition of SEV that:

> "The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator

appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The law of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

The agreement provided that as to the acquisition of FLS that:

"The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

The closing of the transaction was accomplished in Geneva, Switzerland, in June, 1969. Nearly one year later,

Alberto discovered that the trademark rights purchased from Scherk were subject to substantial encumbrances. A dispute arose, and Alberto attempted to rescind the purchase agreement; it tendered the business to Scherk, who refused to accept the tender.

Scherk first took steps to institute arbitration in early 1971; however, a request for arbitration was not filed with the International Chamber of Commerce until November 9, 1971. Alberto commenced the instant action in the district court for the northern district of Illinois on June 11, 1971, alleging that it was defrauded in the acquisition of these businesses in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.

As pertinent here, 28 U.S.C. § 1292(a) provides:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions. . . ."

The appellee contends that the district court's order preliminarily enjoining Scherk from proceeding with arbitration in Paris and denying a stay of its own proceedings is not an interlocutory injunction within the meaning of 28 U.S.C. § 1292(a)(1). We disagree.

The practical result of the district court's order is to terminate Scherk's recourse to arbitration of the dispute before the International Chamber of Commerce in Paris and as such, the order qualifies as an "injunction" within the meaning of 28 U.S.C. § 1292(a)(1). *Ettleson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *Shanferoke Co.* v. *Westchester Co.*, 293 U.S. 449 (1935);

Merritt-Chapman & Scott Corp. v. *Pennsylvania Turn. Com'n,* 387 F.2d 768 (3d Cir. 1967); *Cuneo Press* v. *Kokomo Jamdler's Union No. 34,* 235 F.2d 108 (7th Cir. 1956). Accordingly, the motion to dismiss the appeal may not be granted.

The district court based its refusal to stay the proceedings and granted an injunction to bar the parties from proceeding with arbitration before the Paris tribunal on the authority of *Wilko* v. *Swan,* 346 U.S. 427 (1953). That case held that section 14 of the Securities Act of 1933, 15 U.S.C. § 77a et seq., voided agreements made in connection with the purchase of securities to arbitrate disputes which may arise in the future; the aggrieved party has a nonwaivable right to have his dispute determined in a judicial forum. In resolving the conflict between the United States Arbitration Act and the Securities Act of 1933, the Court stated at page 438:

> "Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of these rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decided that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."

The appellant seeks to limit the rule of *Wilko* v. *Swan* to domestic transactions and asserts that the correct rule

for international transactions is found in *M. S. Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). However, the *Bremen* case did not involve the sale of securities and is, therefore, not controlling.

We agree with the district court that the appellant had sufficient contacts within the United States to give the court personal jurisdiction over the appellant. See *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). The question of the district court's jurisdiction turns on whether the transaction here in issue involves "securities" within the purview of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. We conclude that it does.

Section 3(a)(10) of the Securities Exchange Act of 1934 provides:

> "(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

The United States Supreme Court determined in *Tcherepnin* v. *Knight*, 389 U.S. 332 (1969) that this lan-

guage is to be construed broadly to effect the purposes of the act, one of which is "to protect investors through the requirement of full disclosure by issuers of securities". At page 338, the Court stated:

> "As used in the 1933 [Securities Act] and 1934 [Securities Exchange Act] Acts, 'security' embodies a flexible rather than a static principle, one that is capable of adaptation to meet countless and variable schemes devised by those who seek the use of money of others on the promise of profits."

This mandate to construe broadly the term "security" compels our conclusion that the agreement to incorporate the SEV entity, and to transfer the assets of the SEV, FLS and Lodeva entities in exchange for cash and promissory notes involves a "security" within the meaning of the Securities Exchange Act of 1934. *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F.2d 662 (2d Cir. 1971); *Lawrence* v. *Securities and Exchange Comm.*, 398 F.2d 276 (1st Cir. 1968).

We find that the district court did not abuse its discretion in refusing to stay the proceedings before it, pending arbitration. The order appealed from is

AFFIRMED.

STEVENS, *Circuit Judge*, dissenting. In the two decades since the Supreme Court considered the collision between the two conflicting policies which made *Wilko* v. *Swan* such a close case,[1] there have been several important develop-

[1] The district court was reversed by a divided court of appeals, *Wilko* v. *Swan*, 201 F.2d 439 (2d Cir. 1953), which was in turn reversed by a divided Supreme Court. See dissenting opinion of Mr. Justice Frankfurter, 346 U.S. at 439, and concurring opinion of Mr. Justice Jackson, *id.* at 438.

ments which significantly affect the wisdom of applying the rule of that case to a transaction such as this. On the other hand, the relevant statutory language has not changed materially and it is not easy to identify a principled basis for distinguishing that case from this. Nevertheless, since I am persuaded that Congress did not intend the Exchange Act of 1934 to hamper the ability of American firms to acquire foreign businesses, I believe this arbitration clause should be enforced.

Since 1953 the policy of encouraging the settlement of disputes by arbitration has received increasingly strong endorsement, see, *e.g.*, *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 385 (2d Cir. 1961); *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395, 404; *Halcon International, Inc.* v. *Monsanto Australia Ltd.*, 446 F.2d 156 (7th Cir. 1971), cert. denied, 404 U.S. 949.[2] During this period overseas commercial activities of American business enterprises have expanded dramatically, adding emphasis to the value of arbitration as a method of adjusting international business disputes.

> "For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex ma-

[2] Judicial support for arbitration was slow to manifest itself. In an interesting footnote to his opinion in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), Judge Frank reviewed early examples of legislative approval of arbitration to support his comment: "In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration." *Id.* at 985. See *id.* at 985 n. 24a.

chine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 8-9.[3]

An excessively paternalistic attitude toward American overseas investment will inevitably make American capital less attractive to foreign firms.

At the same time, the coverage of the Exchange Act of 1934 has been growing at a pace which makes it operative in situations quite unlike those in which the Securities Act of 1933 typically applies. The holding in *Wilko* v. *Swan* rested, in part, on the fact that the 1933 Act was intended to give special protection to the relatively uninformed, individual investor.

"While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal

[3] As Judge Gordon points out, the *Zapata* case did not involve the sale of securities and therefore is not controlling here. Moreover, the Chief Justice expressly limited his opinion to international agreements "unaffected by fraud," 407 U.S. at 12. Nevertheless, I believe the policy considerations which underlie that decision are relevant here.

terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.

"When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary." 346 U.S. 427, 435.[4]

The Exchange Act of 1934 also provides essential protections for the individual investor trading in the imperson-

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[4] The brief for the Securities and Exchange Commission, Amicus Curiae, emphasized the statutory concern for the disadvantaged position of the average investor.

"Congress conceived that securities are 'intricate merchandise', and that the public interest demanded legislation which would recognize the gross inequality of bargaining power between the professionals in the securities business and the average investor." Amicus Brief p. 15.

"The Securities Act of 1933 . . . was designed primarily to protect the less informed members of the public against the professionals, in the light of past experience which indicated that misrepresentations not infrequently were made and that under pre-existing law it was extremely difficult for the customer to obtain adequate redress." *Id.* at 33.

"Contrary to the purpose of Congress, the decision below gives no recognition to the grossly unequal positions of the securities firm and the average customer who, before effecting a purchase, is requested to sign a fine-print form agreement." *Id.* at 45-46.

al securities market. Insofar as that Act proscribes insider trading, "sales against the box" by controlling persons, manipulative and deceptive practices in connection with purchases and sales over a stock exchange, and similar aspects of transactions between the average investor and a relatively more sophisticated broker, dealer, or insider, quite obviously the rationale of *Wilko* v. *Swan* would preclude the enforceability of an agreement to waive a judicial remedy under the Act. For in such situations the same kind of disparity in either information or bargaining power is likely to be present, and there is no more reason to favor arbitration than in disputes arising under the 1933 Act.

But with the application of Rule 10(b)(5) to negotiated transactions in which the amount at stake typically justifies an independent audit or other verification of the property being purchased or sold, and the transfer of securities is a function of the form in which the parties elect to cast their transaction, quite different considerations apply. To the extent that reliance on statutory protection plays a relatively less significant part in the investment decision, there is a correspondingly lesser justification for a prohibition against any waiver of the benefits of the Act. Moreover, in transactions which are sufficiently large and complex that the parties typically contemplate the possibility of future controversy, the method of resolving foreseeable disputes is itself a proper subject of bargaining. In the international market, the inability to agree on a neutral forum quite clearly may have an impact on the price of the transaction, or even the acceptability of a prospective purchaser. The reason for the rule of *Wilko* v. *Swan* simply does not fit this case.

In view of the substantial identity between the language of § 14 of the 1933 Act,[5] and § 29(a) of the 1934 Act,[6] it is not easy to give the two provisions different interpretations. Nevertheless, since even *Wilko* v. *Swan* approves a measure of license in reading § 14,[7] and since even the same words in different parts of the same statute may be read differently,[8] I am persuaded that § 29(a) may be read to permit enforceability of certain agreements to arbitrate disputes which involve a claimed violation of the 1934 Act.

Section 29(a) prohibits the plaintiff from waiving the defendant's compliance with any "provision" of the Act. For present purposes, the relevant "provision" of the 1934 Act is § 27 which authorizes the plaintiff to bring a

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[5] "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void." 48 Stat. 84, 15 U.S.C. § 77n.

[6] "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 48 Stat. 903, 15 U.S.C. § 78cc(a).

[7] The text of § 14 does not support the limitation of the holding to stipulations made before any controversy arose. Moreover, the language prohibiting waiver of "compliance with any provision of this title" could easily have been read to relate to substantive provisions of the Act without including the remedy provisions.

[8] See, *e.g.*, *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258-259; *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87-88; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433; *Grand Lodge* v. *King*, 335 F.2d 340, 344-345 (9th Cir. 1964).

civil action in the federal district court.[9] There is no language in the Act obligating the defendant to act in "compliance with" § 27. What is waived—if the arbitration agreement is enforced—is plaintiff's right to sue rather than defendants' obligation to comply with the Act. Thus, enforcement of the arbitration agreement is consistent with a literal reading of the text of §§27 and 29(a).

It is not, however, entirely consistent with the reading given § 14 of the 1933 Act by the Supreme Court in *Wilko* v. *Swan*. But that reading depended less on the

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[9] Section 27 provides:

"Sec. 27. The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts." 48 Stat. 902-903, 15 U.S.C. § 78aa.

text of the statute than on its underlying policy.[10] The text of the 1933 Act, like the text of the 1934 Act, renders void any waiver by a plaintiff of defendant's obligation to comply with the statute. Neither text expressly applies to the plaintiff's waiver of his right to sue in a federal court. Moreover, the rule of *Wilko* v. *Swan* does not entirely prohibit the plaintiff's waiver of that right; the case merely decided *when* plaintiff may not waive a right—namely, before the dispute under the 1933 Act has arisen.[11] Thus, I do not read *Wilko* v. *Swan* as a case giving fixed meaning to ambiguous statutory language. Rather, I believe it is more fairly construed as a case holding that in certain situations the enforceability of arbitration agreements should be denied as contrary to the public policy expressed in the statute as a whole, and extending the literal coverage of § 14 of the Act to achieve that purpose.[12]

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[10] In the court of appeals the issue in *Wilko* v. *Swan* was stated as "whether the 1933 Act evidences a public policy which forbids referring the controversy to arbitration." 201 F.2d at 443. That court accurately pointed out that the question was not expressly answered by the statutory language: "Although the question is not free from doubt and Judge Goddard's opinion presents a strong argument against the conclusion we have reached, we do not find in the purpose or in the language of the statute, any policy argument strong enough to override the policy of the Arbitration Act. If Congress had intended to forbid arbitration in a suit based on section 12(2), we believe it would have expressed such intent." *Id.* at 445.

[11] See *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1213 (2d Cir. 1972).

[12] In the Summary of Argument in its brief Amicus Curiae in the Supreme Court, the Securities and Exchange Commission relied primarily on statutory policy rather than statutory language: "The arbitration provision should be held invalid because of conflict with the policy of Congress, and as an attempted waiver of the customer's

(footnote continued)

The same rationale justifies an expansion of the coverage of § 29(a) of the 1934 Act beyond its literal meaning to find unenforceability of arbitration agreements which would defeat the purposes of that Act.[13] But in a case such

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statutory rights prohibited by Section 14 of the Act." Amicus Brief, p. 11. Its public policy argument was also advanced independently of § 14: "Wholly apart from the inclusion of an express anti-waiver provision in a statute, public policy prohibits the recognition and enforcement of stipulations limiting or preventing access to the courts where the statutory rights involved, although conferred on a private party, are affected with a public interest." *Id.* at 23.

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[13] See *Reader* v. *Hirsch & Co.*, 197 F.Supp. 111 (S.D.N.Y. 1961), holding that a broker could not compel a customer to arbitrate a claim for losses allegedly resulting from a violation of the margin requirement of § 7 of the 1934 Act.

It is interesting to note that in *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971), after demonstrating that § 28(b) of the 1934 Act made it perfectly clear that § 29(a) did not preclude enforcement of the compulsory arbitration rules of the New York Stock Exchange, Judge Timbers, who had presented the oral argument on behalf of the S.E.C. in *Wilko* v. *Swan*, see 346 U.S. at 427-428, thought it appropriate to add this dictum:

> "Moreover, the policy considerations relied on by the Supreme Court in *Wilko* are inapposite here. The Supreme Court found that the non-waiver provision there involved was designed to protect investors. 346 U.S. at 431. Without such provision, financial houses might escape statutory liability by taking advantage of the inferior bargaining position of customers. But the legislative policy of protecting investors will not be thwarted by compelling an exchange member to arbitrate, at the instance of a nonmember, a dispute which is arbitrable under the exchange's constitution." *Id.* at 842-843.

My appraisal of this case is not supported by a provision comparable to § 28(b), but I consider it plain that the policy of the 1934 Act would not be thwarted by enforcing this agreement, whereas the strong countervailing policy identified by the Chief Justice in *Zapata* will be compromised if it is not enforced.

as this, and no doubt in less extreme cases as well, I would interpret § 29(a) as meaning no more than it actually says, and respect what I regard as the stronger policy mandated by § 201 of the Federal Arbitration Act, 9 U.S.C. § 201.

The dispute between these parties over the alleged shortage in defendant's inventory of European trademarks, a matter covered by contract warranties and subject to preclosing verification, is the kind of commercial dispute for which arbitration is entirely appropriate. In my opinion, the fact that the "fraud" language of Rule 10(b)(5) has been included in the complaint is far less significant than the desirability of having the Court of Arbitration of the International Chamber of Commerce in Paris, France, decide the various questions of foreign law which should determine the rights of these parties. I would require this representative of the American business community to honor its bargain.

I respectfully dissent.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT
for the Northern District of Illinois, Eastern Division

ALBERTO-CULVER COMPANY,
a Delaware corporation,

Plaintiff

vs.

FRITZ SCHERK,

Defendant.

No. 71 C 1414

MEMORANDUM OF DECISION

January 17, 1972

This cause is before this Court on defendant Scherk's motion to dismiss this action on a number of grounds: lack of subject matter jurisdiction, lack of personal jurisdiction over Scherk, and on the basis of the doctrine of forum non conveniens. In the alternative defendant moves to stay these proceedings pending arbitration before the International Chamber of Commerce. Finally, defendant moves to strike the claim for exemplary damages contained in Counts I and III.

SUMMARY OF FACTS

The plaintiff, Alberto-Culver (hereinafter referred to as "Alberto") is a Delaware corporation whose principal place of business is located in Melrose Park, Illinois. It is engaged in the business of manufacturing and marketing cosmetic products for domestic and international markets.

Defendant Scherk is a German citizen who presently resides in Geneva Switzerland. Prior to the instant dispute

Scherk owned several businesses which were engaged in the manufacture and distribution of cosmetic products in Western Europe and various other international markets. The sale to Alberto of three of these businesses is the subject matter of this law suit. *Scherk Establissement Vaduz* (hereinafter referred to as "SEV"), was originally a Liechtenstein business entity which was subsequently transformed at the request of Alberto into a Liechtenstein corporation. SEV was a corporate holding company which licensed the international distribution of various Scherk products under a variety of trademarks which were held by SEV. Pursuant to the contract Alberto acquired all of the SEV stock.

The second business acquired by Alberto was a German corporation, *Lodeva Herstellung und Vertrieb Kosmetischer Artikel* GMBH (hereinafter referred to as "Lodeva"). The third business purchased by Alberto was a sole proprietorship known as *Firma Ludwig Scherk* (hereinafter referred to as "FLS").

After preliminary contacts between the two parties in June and November of 1967 serious negotiations for the purchase of the three businesses began in December 1967, when Mr. Lavin, the President of Alberto, and Benjamin Navon, defendant's brother-in-law and plant manager, met in Melrose Park, Illinois to discuss the nature and background of FLS, SEV and Lodeva. At this meeting the discussion primarily focused on acquisition of FLS rather than the acquisition of SEV or Lodeva.

In February, 1968, Alberto contacted Scherk in a successful effort to resume negotiations. A series of discussions between Lavin and Scherk in Berlin culminated in a 3-day meeting in late May and early June of 1968 in Melrose Park, Illinois. Representing the Scherk interests were Messrs. Scherk and Navon and Mr. Stuart Marks. Mr.

Lavin and several other executives represented Alberto Culver. At that meeting agreement was reached as to the basic provisions of the sale of FLS, SEV and Lodeva to Alberto.

After the May-June, 1968 meeting ancillary negotiations took place in both Europe and the United States between the representatives of each side in order to produce a written agreement satisfactory to both parties. In February 1969, Scherk signed the various agreements in Vienna, Austria. (See Complaint, Par. 4). The closing took place in Geneva, Switzerland in June 1969.

The three-count Complaint filed by plaintiff, Alberto, alleges that defendant Scherk made false and fraudulent misrepresentations and omissions as to material facts in connection with plaintiff's purchase from defendant of the three business entities. The gist of plaintiff's complaint is that defendant misrepresented the value and validity of certain trademarks held by SEV which were an integral component of the transaction in question.

Count I alleges a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Count II alleges a violation of common law liability for fraud and deceit and for breach of expressed contractual warranties. Count III seeks alternative relief and stands or falls on the validity of Counts I and II. Counts I and II seek as relief recision of the contract between Alberto and Scherk, compensatory damages, exemplary damages, costs, and an injunction forbidding arbitration of the dispute pursuant to the sales contract.

Defendant, Fritz Scherk, has moved to dismiss the Complaint in the above captioned case on several grounds: (1) That the Complaint fails to state a cause of action

under Section 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act, as amended, 15 U.S.C. Section 78j; (2) That the activities complained of were extra-territorial and Section 10(b) does not regulate extra-territorial conduct; (3) That the Court does not have *in personam* jurisdiction over the defendant Fritz Scherk; and, (4) That the action should be dismissed on the basis of the doctrine of *forum non conveniens*. In the alternative, the defendant moves that the proceedings in this Court be stayed pending the outcome of arbitration proceedings in Paris, France before the Court of Arbitration of International Chamber of Commerce. Finally, defendant has moved that the claim for exemplary damages contained in Counts I and III of the Complaint be stricken.

For the reasons set out below defendant's motion to dismiss is denied. The Court finds that the Complaint states a cause of action under Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. The Court further finds that the service of process on defendant Scherk was properly effected and that the "minimal contacts" requirement of the 14th Amendment due process clause of the United States Constitution has been satisfied. Therefore, the Court has jurisdiction over both the subject matter and the defendant Scherk. The Court also finds that the doctrine of *forum non conveniens* is inapplicable to the instant action. In addition, defendant's motion to stay these proceedings pending the pursuit of arbitral remedies before the International Chamber of Commerce is denied. Finally, defendant's motion to strike the claim for exemplary damages in Counts I and III is granted, and it is hereby ordered that Par. 4 of the Prayer for Relief in Count I and Par. 3 of the Prayer for Relief in Count III be stricken.

SUBJECT MATTER JURISDICTION

The defendant's contention that this Court lacks subject matter jurisdiction rests upon two distinct grounds: First, that the conduct complained of fails to state a cause of action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; and, secondly, that the conduct which is the subject of the instant complaint occurred outside the United States and is not subject to United States legislative regulation.

Scherk contends that plaintiff's action fails to state a cause of action under Section 10(b) and Rule 10b-5 because there were no "securities" involved in the transaction, and, further, none of the "alleged fraudulent representations applied to [the securities]".

Scherk's first contention is clearly inaccurate. In regard to the acquisition of FLS, it is clear from the affidavits submitted to this Court that Alberto purchased (with certain exceptions) all of the assets of FLS. The acquisition of Lodeva was a transfer of the securities of a German corporation. (See Complaint, Par. 3; Brief in Support of Defendant's Motion to Dismiss or Alternatively to Stay, p. 8). The mere fact that the written agreement fails to refer to "securities" does not negate the fact that securities were in fact transferred. Finally, the purchase agreement (Complaint Exhibit 1, Sec. 1.1) provides that Alberto would have an irrevokable option (which was exercised) to purchase:

> "All issued and outstanding shares of stock of a new Liechtenstein corporation (hereinafter called 'AG' to be formed by seller in accordance with Section 1.4. AG shall own all assets . . . of Scherk Establissment Vaduz, a Liechtenstein establishment (hereinafter called "SEV"), as of the date of the transformation described in Section 1.4." Complaint, Exhibit 1, §1.1

The fact that SEV was converted into a corporation at the behest of Alberto is irrelevant and fails to support defendant's contention that securities were not involved in the transfer.

As the above language demonstrates the parties contemplated and effected a transformation of SEV from a sole proprietorship to a "stock corporation."

The three acquisitions involve the transfer of "securities" as defined by Section 3(a)(10) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. Section 78c (a) (10).

Scherk's contention that the allegedly false representations did not apply to the securities but rather applied to the trademarks is not well taken. Alberto's primary interest in acquiring the trademarks is well documented by the affidavits and pleadings spread of record before this Court. If false representations or omissions were made as to the value of the trademarks, then the false representations were made "in connection with the purchase . . . of any security." For Section 10(b) and Rule 10b-5 clearly cover the situation where, as here, the alleged fraud relates to the value underlying the securities rather than to the securities *per se*. See *Kohler* v. *Kohler*, 319 F. 2d. 634 (7th Cir. 1963).

The value and validity of the trademarks, particularly in this transaction, determined the value of the securities to Alberto.

> "Section 10(b) must be read flexibly, not technically or restrictively. Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is regress under Section 10(b)."

Superintendent of Insurance, as liquidator of *Manhattan Casualty Company* v. *Bankers Life and Casu-*

alty Company, United States Supreme Court, No. 70-60 November 8, 1971, slip opinion, page 6.

It is found then that the alleged fraudulent misrepresentations and omissions were made "in connection with the purchase" of the above securities. Therefore, the Complaint states a cause of action under Section 10(b) and Rule 10b-5.

Having found that a cause of action is stated under Section 10(b) and Rule 10b-5, the Court must now focus its attention on the issue of whether or not any of the alleged violations of the Rule occurred within the boundaries of this District.

The basic theory propounded by the defendant to support its contention is that Section 10(b) does not regulate "foreign" transactions; that the elements of the transaction are basically "foreign"; and, therefore, the instant case is not subject to Section 10(b) regulation.

The Court is of the opinion that, although much of this complex and prolonged transaction occurred extra-territorially there was sufficient contact within the territorial boundaries of the United States to subject the transaction to the jurisdiction of this Court.

The facts that lead to this conclusion are numerous. First, the crucial negotiations which led to the consummation of the transaction were held in Melrose Park, Illinois in May-June 1968. It was at this three-day meeting between Scherk and Lavin that the basic agreement to acquire the Scherk businesses was reached. This finding is supported by a letter dated June 6, 1969 addressed to Lavin from the defendant Scherk in which the defendant states:

"It is more than a year ago that we last met at Melrose Park to agree upon a transaction which will now

at long last come to its closing . . . I, therefore, invite you to come to Geneva at a date convenient to everyone in order to close the deal which I was glad to agree to at your office one year ago." Lavin Affidavit, Exhibit B.

It has not been conclusively demonstrated that Mr. Scherk made any "untrue statement of material fact." However, the sanctions of Rule 10b-5 are not limited to positive fraudulent misrepresentation, but, in addition, forbid failure "to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading." (Rule 10b-5 (2), 17 CFR 240-10b-5). If the defendant failed to advise plaintiffs of the actual value of the trademarks held by the defendant while aware of the value that the plaintiffs attached to the trademark, then defendant would have failed to state a material fact, the omission of which, in light of the surrounding circumstances, would have been misleading. Such allegations, if accurate, would indicate that a serious violation of Rule 10b-5 had occurred within the Northern District of Illinois.

Secondly, the communications between Alberto and Mr. Marks, defendant's attorney, subsequent to the May-June 1968 meeting, as to the validity, value and non-contested status of the trademarks in contention occurred within the territorial jurisdiction of the United States. (See Silver affidavit. Exhibits A through L).

Finally, the full economic impact of the alleged fraud occurred within the United States. Alberto is a Delaware corporation whose principal place of business is located in Illinois. Its securities are traded on the New York Stock Exchange. The economic impact caused by the alleged misrepresentation and omissions was absorbed by Alberto-Culver.

For these reasons, the cases cited by defendant in support of its position are inapposite. In *Finch* v. *Marathon Securities Corporation,* 316 F. Supp. 1345 (S.D.N.Y. 1970), the District Court held that it lacked subject matter jurisdiction over a 10b-5 action brought by a British resident against other foreigners for injuries sustained as a result of being fraudulently induced in England to buy securities of a foreign corporation. There was no allegation of domestic injury or consequence. In so holding, the District Court noted that

> "when, as here: (1) the substance of the allegedly fraudulent conduct occurred outside the United States; (2) the parties are predominantly foreign; (3) the subject shares are securities in a foreign corporation, neither registered nor traded on a national exchange; and (4) there is no showing of any domestic injury, it would appear that the District Court is without subject matter jurisdiction, despite the existence of other less meaningful American based facts and events." 316 F. Supp. at 1349.

The *Finch* case is not persuasive precedent for the instant fact situation. In the suit before this Court the substance of the allegedly fraudulent activity occurred within the United States. The parties here are not "predominantly foreign". Finally, there has been a showing of domestic injury as a result of the alleged fraudulent activity.

This Court will follow the careful and well-reasoned opinion of Judge Levet in *Ferraioli* v. *Cantor,* 259 F. Supp. 842 (S.D.N.Y. 1966). In that case, a former shareholder filed suit under Section 10(b) and Rule 10b-5 against a Canadian corporation which held controlling interest in a New York corporation for transferring control of the New York corporation at a premium while failing to disclose the premium offered and affording equal opportunity for other shareholders to participate in

the transaction. The District Court held that it had jurisdiction over the subject matter of the law suit. The Court stated:

> "All in all, it is my opinion that the course of conduct which is alleged as a violation of the Securities Exchange Act of 1934 in this case occurred at least in part within the United States and that jurisdiction of the United States Courts over the subject matter of this action is sustained by those acts." 259 F. Supp. 842, 846.

Accordingly, this Court holds that it has jurisdiction of the subject matter of this suit. The Complaint states a cause of action under Section 10(b) and Rule 10b-5. Further, a portion of the alleged fraudulent activity occurred within the jurisdiction of this District.

PERSONAL JURISDICTION

The second prong of defendant's motion to dismiss is based on the contention that this Court lacks personal jurisdiction over the defendant Scherk because (1) service of process was ineffective and should therefore be quashed, and, in the alternative (2) that the 14th Amendment due process requirement of "minimal contacts" has not been satisfied by Scherk's limited connection with the United States.

Although initial service of process may have been faulty, Scherk was served by Swiss authorities on October 8, 1971 with copies of the Summons and Complaint in accordance with Rule 4(e) and 4(i), Fed. R. Civ.P. and Swiss law. The issue of whether service of process was properly effected is now moot. Under Section 27 of the Securities Exchange Act of 1934, "process . . . may be served . . . wherever the defendant may be found." The combination of Section 27, when read in conjunction with Rules 4(e) and 4(i) permits service in a foreign

country. *SEC* v. *VTR, Inc.*, 39 F.R.D. 19 (S.D.N.Y. 1966); *Ferraioli* v. *Cantor*, 259 F. Supp. 842 (S.D.N.Y. 1966).

The remaining substantive issue is whether the 14th Amendment due process requirement of "minimal contacts" precludes this Court from assuming personal jurisdiction over the defendant Scherk. Cf. *International Shoe Company* v. *State of Washington*, 326 U.S. 310 (1945); *McGee* v. *International Life Insurance Company*, 355 U.S. 220 (1957).

Scherk's visit to Melrose Park, Illinois in May-June 1968 and his attorney's visit to Chicago on December 8, 1968 satisfies the minimal contact requirement of the 14th Amendment due process clause. (See Exhibits A through L of Silver Affidavit) *International Shoe Company* v. *Washington, supra.* The "minimal contact" concept found in *International Shoe* has been extended in *McGee* v. *International Life Insurance Company, supra,* where the United States Supreme Court held that even a single act by an out of state corporation may subject it to the jurisdiction of the forum state if the cause of action in question arises out of that act. See *Livingston* v. *Weiss, Voison, Cannon, Inc.*, 294 F. Supp. 676, 682-683 (D.N.J. 1968). Thus, it has become a firmly established rule that personal jurisdiction over the defendant will be sustained if the defendant was properly served and has committed even a single act within the forum which is a substantial and material part of the violation. *Hooper* v. *Mountain State Securities*, 282 F. 2d. 195 (5th Cir. 1960), cert. den. 395 U.S. 814 (1968); *Clapp* v. *Stearns*, 229 F. Supp. 305, 307 (S.D.N.Y. 1964).

This Court concludes that the alleged fraudulent conduct of defendant and defendant's agent is sufficient to satisfy the 14th Amendment due process requirements of "minimal contacts". Therefore, the service of process

having been properly effected, this Court has personal jurisdiction over the defendant Scherk.

FORUM NON CONVENIENS

Forum Non Conveniens is a doctrine which permits a court to dismiss an action although jurisdiction is validly asserted when in the court's discretion convenience of the parties and the ends of justice would be better served if the action were entertained in another forum.

Title 28 U.S.C. §1404(a), enacted in 1948, codified and replaced the doctrine of *forum non conveniens* in situations where the more convenient tribunal is a United States District Court where the action could originally have been filed. See *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955).

However, the doctrine has retained its original vitality as to cases which lie outside the scope of §1404(a). For example, a Federal Court possesses the inherent power to refuse to exercise its jurisdiction over a case which may have been originally instituted before a foreign tribunal. *DeSainigne* v. *Gould*, 177 F. 2d. 515 (2nd Cir. 1947); *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F. 2d. 633 (2nd Cir. 1956). *cert. den.* 352 U.S. 871. Thus, the instant case is governed by the doctrine of *forum non conveniens* rather than the provisions of 28 U.S.C. §1404(a).

It should be noted that the power to refuse to exercise jurisdiction when it has been validly asserted lies within the discretion of the trial judge. The doctrine is a harsh rule and should be invoked and applied only in rare and exceptional cases. *Glicken* v. *Bradford*, 204 F. Supp. 300 (D.C.N.Y. 1962).

Defendant's motion to dismiss on the basis of *forum non conveniens* is denied. It has been repeatedly held that doctrine is inapplicable to causes of action brought under

a statute which specially provides for venue. *Baltimore & Ohio Railroad* v. *Kemper*, 314 U.S. 44 (1941) (F.E.L.A.); *United States* v. *National City Lines*, 334 U.S. 573 (1948) (Clayton-Anti-Trust Act). While defendant notes that neither case deals with the Securities Exchange Act, his conclusion that the cases are inapposite is in error. In *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947) the United States Supreme Court, after noting that in *Kemper* that plaintiff's choice of forum under the F.E.L.A. could not be defeated by the doctrine of *forum non conveniens* because of the special venue section of the statute stated that "those decisions do not purport to modify the doctrine as to other cases governed by the *general* venue statutes." 330 U.S. at 505. (Emphasis added)

Further, in its opinion, the Court stated:

> "the principle of forum non conveniens is simply that a Court may resist imposition on its jurisdiction even when jurisdiction is authorized by the letter of the *general* venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of court, so that he may be sure of some place in which to pursue his remedy." 330 U.S. at 507.

Finally, the holding of the United States Supreme Court that the special venue provisions of the F.E.L.A. and the Clayton Act were subject to §1404(a) is inapposite here. See *Ex Parte Collett*, 337 U.S. 55 (1949); *Kilpatrick* v. *Texas & Pacific R. R.*, 337 U.S. 75 (1949); *United States* v. *National City Lines*, 337 U.S. 78 (1949). As was noted above, the doctrine of *forum non conveniens* rather than §1404(a) governs the disposition of defendant's motion. Thus, a ruling that §1404(a) is applicable to statutes containing a special venue provision does not dictate or even imply that *forum non conveniens* has lost its vitality.

Both *forum non conveniens* and §1404(a) proceed on the assumption that there is an alternative tribunal which will be more hospitable to plaintiff's claim. *Odita* v. *Elder Dempster Lines, Ltd.*, 286 F. Supp. 557, (S.D.N.Y. 1968.) *Silver* v. *Country Wide Realty, Inc.*, 39 F.R.D. 596 (D.C. N.Y. 1966). United States Courts have exclusive jurisdiction of actions under the Securities Exchange Act of 1934. Securities & Exchange Act, Section 27, 15 U.S.C. §78aa. Although the International Chamber of Commerce arbitration court is available for pursuit by plaintiff of his contractual remedies it is not available to try the cause of action alleged under Section 10(b) and Rule 10b-5. The net result is that there is no District Court to which the action could be transferred pursuant to §1404 (a), nor is there an alternate tribunal which plaintiff could utilize if he were to be dismissed from this Court in accord with the doctrine of *forum non conveniens* in which he could pursue his remedies under Section 10(b) and Rule 10b-5. For the above reasons defendant's motion to dismiss on the basis of *forum non conveniens* is denied.

STAY OF PROCEEDINGS

Assuming that this action is not dismissed for any of the foregoing reasons, defendant has moved in the alternative to stay the proceedings before this Court in order to allow the parties to pursue their contractual remedies before the International Chamber of Commerce tribunal in Paris, France.

In *Wilco* v. *Swan, et al.*, 346 U.S. 427 (1953) the United States Supreme Court held that an agreement to arbitrate future controversies relating to a margin purchase agreement which was entered into by a securities broker and a purchaser was voided by Section 14 of the Securi-

ties Exchange Act of 1933, as amended, 15 U.S.C. Sec. 77n. The issue before the Court was

> "whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding on any person acquiring any security to waive compliance with any provision of the Securities Act which Section 14 declares 'void' " 346 U.S. at 430.

The Court characterized the arbitration clause contained in the contract as a "stipulation", and concluded that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under Section 14 of the Securities Act." 346 U.S. at 435.

The Court stated that "we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." 346 U.S. at 438.

Defendant seeks to avoid the thrust of the *Wilco* decision by limiting the application of that case to arbitration agreements executed prior to the existence of any controversy. Defendant correctly contends that *Wilco* is inapplicable to an arbitration agreement entered into in order to settle an existing dispute. This is an accurate statement of the case. However, defendant's attempt to characterize the contractual agreement to arbitrate as an election by the plaintiff "to submit an existing dispute to arbitration" must fail.

The federal cause of action in this case is based upon Section 10(b) and Rule 10b-5 of the Securities & Exchange Act of 1934. The United States District Courts have exclusive jurisdiction of this type of law suit. (See page 18) Therefore, the defense raised by SEV in the Liechtenstein court that defendant's (plaintiff in the Liechtenstein action) claim was subject to arbitration

does not constitute an agreement by *both* parties to submit an existing Section 10(b) dispute to arbitral jurisdiction.

Therefore, defendant's motion to stay these proceedings pending arbitration before the International Chamber of Commerce is denied.

EXEMPLARY DAMAGES

Defendant's motion to strike the prayer for exemplary damages based upon violations of Section 10(b) and Rule 10b-5 is granted. Plaintiff's request for relief contravenes the explicit statutory language contained in Section 28(a) of the Act which provides that ". . . [N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained of." Section 28(a) Securities Exchange Act of 1934, as amended, 15 U.S.C. Section 78 bb (a)."

Although this specific issue has not been decided by the Seventh Circuit Court of Appeals, the interpretation of Section 28 (a) which precludes the recovery of punitive damages in a private suit under Section 10(b) has been repeatedly upheld. *Green* v. *Wolf Corp.*, 406 F. 2d. 291 (2nd Cir. 1968) *cert. den.* 395 U.S. 977 (1969); *Globus* v. *Law Research Service, Inc.*, 418 F. 2d. 1276 (2nd Cir. 1969) *cert. den.* 397 U.S. 913 (1970).

Therefore, it is hereby ordered that Par. 4 of the Prayer for Relief in Count I and Par. 3 of the Prayer for Relief in Count III be stricken from the Complaint.

/s/ William J. Lynch
Judge, United States District Court

Dated: January 17, 1972

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

August 2, 1973

No. 72-1158

ALBERTO-CULVER COMPANY, a Delaware Corporation,

Plaintiff-Appellee,

vs.

FRITZ SCHERK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

(SEAL)

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

October 18, 1973.

No. 72-1158

ALBERTO-CULVER COMPANY,

Plaintiff-Appellee,

vs.

FRITZ SCHERK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX E

The Federal Arbitration Act, 9 U.S.C.

Section 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 201.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202.

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 206.

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 208.

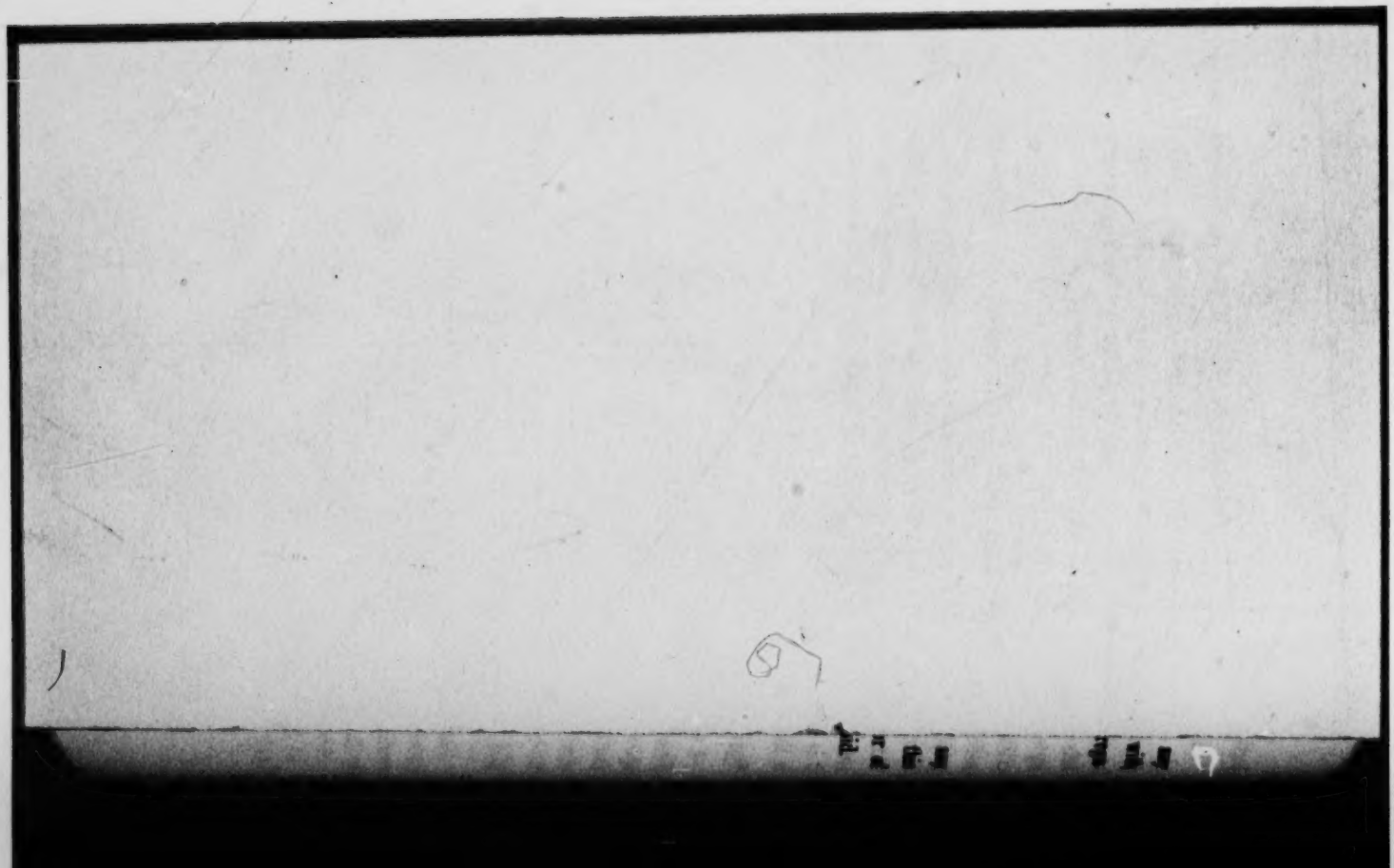
Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Securities Act of 1933, Section 14

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934, Section 29(a)

Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781.

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTION PRESENTED.

Respondent Alberto-Culver Company ("Alberto") respectfully submits that the "Question Presented" as formulated by Petitioner Scherk is inaccurate. The Opinions of both the District Court and the Court of Appeals made it clear that the arbitration clause of the Agreements here involved was not held invalid simply "because a claim, as yet not proven, has now been made that the Securities Exchange Act of 1934 has been violated." (Petition, p. 2.) Rather, both Courts held that an agreement to arbitrate future disputes was unenforceable under Section 29(a) of the Exchange Act, 15 U. S. C. § 78cc(a), where the defendant, a foreign national, was alleged to have committed securities fraud *in the United States* to the injury of an American company in violation of Section 10b of the Exchange Act and Rule 10b-5 promulgated thereunder.

STATEMENT OF THE CASE.

Petitioner's "Statement of the Case" omits significant facts necessary to gain perspective as to the issues adjudicated below. Accordingly, a Counter-Statement is required.

Alberto is a Delaware corporation with its principal place of business in Melrose Park, Illinois, and is engaged in manufacturing and mass marketing of toiletries and other products. (App. 2, 18; Lavin Affidavit, para. 1-2.)* The Defendant Scherk is a German citizen residing in Geneva, Switzerland. (App. 2, 18; Scherk Affidavit, para. 1.) Prior to February 1969 Scherk owned several interrelated businesses which manufactured and sold cosmetic products primarily in Western Europe. (App. 2, 18-19; Lavin Affidavit, para. 2; Scherk Affidavit, para. 2.)

Most of Scherk's direct manufacturing operations were in Berlin, Germany, in a sole proprietorship called Firma Ludwig Scherk ("FSL"). (Lavin Affidavit, para. 2.) Another Scherk business was Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH ("Lodeva"), a German limited liability company. (App. 2, 19.)

Scherk also owned a 100% interest in Scherk Etablissement Vaduz ("SEV"), a form of Liechtenstein corporation, which was a holding company internationally licensing sales of Scherk products under trademarks purportedly owned by SEV. (App. 2, 19; Lavin Affidavit, para. 3.)

Prior to June 1968, exploratory negotiations between Alberto and Scherk took place for the sale by Scherk of all or part of the Scherk businesses. In December 1967 Mr. Leonard Lavin, Alberto's president, met personally in Melrose Park, Illinois, with Mr. Benjamin Navon, Scherk's plant manager, and discussed with him the nature and background of Scherk's businesses. (App. 2-3, 19; Lavin Affidavit, para. 5; Scherk Affidavit, para. 2.)

* The affidavits cited were filed with the District Court and were reproduced in the appendix before the Court of Appeals but have not been included in the appendix to the Petition.

Navon pointed out to Lavin that, although the "German business" (FLS) had experienced serious financial difficulties in recent years, the "Scherk International Business" (SEV) had earned substantial profits through royalty income derived from its trademark-licensing arrangements. Navon stated that the success of SEV was due in large part to the effective exploitation of the SEV trademark portfolio through license agreements which generated significant royalty income and that Scherk would be most reluctant to sell this "International business". (Lavin Affidavit, para. 5.)

The discussions centered mainly on a possible Alberto acquisition (for a price of $500,000) of FLS, the unprofitable German business. Scherk rejected Lavin's offer to purchase the German business. (App. 19; Lavin Affidavit, para. 5.)

Negotiations were resumed in March 1968. (App. 3, 19; Lavin Affidavit, para. 6; Scherk Affidavit, para 3.) On April 30, 1968, Scherk sent a letter to Lavin offering to come to Melrose Park and conclude agreement on a deal for virtually all of the Scherk-owned businesses, including SEV, at a much higher price:

> In order to avoid any further misunderstandings and, above all, further delays, I would suggest that my brother-in-law, Mr. Navon should come over to Chicago with our lawyer Mr. Stuart Marks, of Kaye, Scholer, Fierman, Hayes & Handler 425 Park Avenue, New York. This way a preliminary *agreement on the principles of the deal can be concluded,* leaving legal and other details to the experts.
>
> Although Mr. Navon has my power of attorney to sign and conclude any agreement *I could,* if you so wish, *come* over on shortest *notice for signature.* (Emphasis supplied.) (Letter by Scherk to Lavin, Exhibit A to Lavin Affidavit.)

As a result, Scherk and Navon, and Scherk's New York lawyer, Mr. Stuart Marks, came to Melrose Park, Illinois, in late May or June 1968 for further discussions. Scherk met with Lavin and other Alberto representatives and extensive and detailed discussions over a three-day period were held. (App. 3, 19-20; Lavin

Affidavit, para. 6; Scherk Affidavit, para. 3.) As a direct result of these discussions, Scherk and Alberto came to an agreement in Melrose Park as to the basic terms of the acquisition, including the price to be paid by Alberto. In contrast to the earlier negotiations in December 1967, the negotiations in Melrose Park in May or June 1968 were conducted on the premise that Alberto would acquire not only the unprofitable German business but the profitable SEV trademark operation as well. (App. 3, 19-20; Lavin Affidavit, para. 6.)

During the meeting in Melrose Park, Scherk, in justification of his argument that his businesses were worth substantially more than Alberto had been willing to offer, repeatedly referred to the valuable trademark portfolio owned, in particular, by the "International Business" (SEV), the great drawing power of the name "Scherk" and other trademarks owned by SEV, and the royalty profits generated by SEV through licensing of the trademark rights. Mr. Scherk also emphasized the value of the trademark portfolio to Alberto both for use in connection with Scherk products and as a means of gaining access for its own products to Germany and the licensed countries. (Lavin Affidavit, para. 7.) At no time did Scherk or Navon disclose to Lavin that the Scherk businesses lacked good title to the very trademarks which were under discussion.

As contemplated by Scherk, agreement on the basic terms of the acquisition was reached in the May-June 1968 meeting in Melrose Park, Illinois (App. 3, 20); this is evidenced by Scherk's own subsequent letter to Lavin dated June 9, 1969, prior to closing, in which Scherk stated:

> It is more than a year that we last met at *Melrose Park to agree upon a transaction* which will now, at long last, come to its closing.
>
> • • • • •
>
> . . . and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close *the deal which I was glad to have agreed to at your office, one year*

ago. (Emphasis supplied.) (Letter by Scherk to Lavin, Exhibit B to Lavin Affidavit.)

In November and December 1968, at a time when the parties' attorneys had under consideration the language of the trademark warranties to be included in the agreements, Marks sent to one of Alberto's attorneys in Chicago a telegram and a letter concerning those warranties and made a personal visit to Illinois to discuss the trademarks with Alberto. It is alleged that in those communications there also occurred material misrepresentations with respect to the ownership, validity and integrity of the trademarks. (App. 25; Silver Affidavit, para. 7.)

The agreement between Alberto and Scherk provided that SEV was to be transformed from an establissement into a stock corporation and that Alberto was to acquire 100% of the stock of the transformed corporation, Scherk Enterprises V. Aktiengesellschaft. (App. 3, 22-23.) The formal closings under the Agreements occurred on June 1969. (App. 4, 20.) The agreements of acquisition and the promissory notes were, by explicit choice of the parties, to be governed by Illinois law. (App. 3-4.)

After the acquisition of SEV, Alberto discovered that SEV's trademark portfolio, contrary to Scherk's representations, was subject to substantial encumbrances, known to Scherk and unknown to Alberto, which severely reduced the value of the portfolio. Reporting the results of their investigation of the trademarks, the law firm of Pattishall, McAuliffe and Hofstetter concluded in their letter dated April 6, 1970:

> His [Mr. Andrew's] study of the files, records and various relevant materials discloses breaches of the warranties contained in Sections 3.6(d) (unencumbered title), 3.6(e) (no pending legal or administrative actions) and 3.6(h) (use of marks where required by law). His examination also reveals that many of the matters involved had received the personal attention of Mr. Scherk and of Mr. Navon and Mr. Marks who were Scherk's representatives in the negotiations with Alberto-Culver.
>
> * * * * *

We understand, *and are personally aware*, that it was repeatedly made clear to the negotiators for Scherk that Alberto-Culver expected to receive entirely unencumbered clear title to the trademarks being transferred, and that such was the reason for Alberto-Culver's negotiators insistance upon inclusion of the trademark warranties in the agreements. . . .

In our opinion, the character, nature and value of the trademark rights as represented and warranted by Scherk differ so materially from their actual character, nature and value as to constitute a failure of consideration. Mr. Andrew's and your own recent discoveries dictate our conclusion that the Scherk trademark portfolio is encumbered with limitations, undisclosed by Scherk and not known by Alberto-Culver at the time the agreements were signed, which substantially reduce its value to any purchaser. The portfolio so encumbered must be considered of relatively small value compared to its value without such encumbrances.

Cordially yours,
B. W. PATTISHALL

(Emphasis supplied.) (Exhibit 5 to the Complaint.)

As a result, Alberto rescinded the agreements, tendered the businesses to Scherk, and, upon his refusal to make Alberto whole, brought the present action to enforce rescission under the Securities Exchange Act of 1934 and Rule 10b-5.

REASONS FOR DENYING THE WRIT.

Contrary to Scherk's contention, this is in no sense a case of first impression. In his Petition to this Court, Scherk does not challenge the correctness of the holdings of both the District Court and the Court of Appeals that:

(1) "The Complaint states a cause of action under Section 10(b) and Rule 10b-5", (App. 7, 24);

(2) the "crucial negotiations which led to the consummation of the transaction were held in Melrose Park, Illinois in May-June, 1968" (App. 7, 24);

(3) the allegations of the Complaint, if accurate, "would indicate that a serious violation of Rule 10b-5 had occurred within the Northern District of Illinois" (App. 7, 25); and

(4) "the substance of the allegedly fraudulent activity occurred within the United States" (App. 7, 26).

It follows that, for the purposes of the present Petition, Scherk does not contest the conclusion that the District Court had both subject matter and personal jurisdiction to adjudicate Alberto's Complant.

Under these circumstances, the decisions of the Seventh Circuit Court of Appeals and the District Court represent a straight-forward application of Section 29(a) of the Act and this Court's decision in *Wilko* v. *Swan*, 346 U. S. 427 (1953). Therefore, the Petition fails to meet the requirements of Rule 19 of this Court governing review on certiorari.

A. The Decision of the Court of Appeals Does Not Nullify Chapter Two of the Federal Arbitration Act.

It has repeatedly been held that the commission by a foreign national of securities fraud within this country to the injury of an American citizen, subjects the defendant to the reach of the Exchange Act and the *exclusive* jurisdiction of the United States District Courts under Section 27 of the Act. 15 U. S. C. § 78aa. *Travis* v. *Anthes Imperial Limited*, 473 F. 2d 515 (8th Cir. 1973); *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (2d Cir. 1972); *Ferraioli* v. *Cantor*, 259 F. Supp. 842 (S. D. N. Y. 1966). Accordingly, since the Act as a whole applies to such conduct, Section 29(a) of the Act invalidates agreements to arbitrate future disputes arising thereunder. As this Court stated in *Wilko:*

> Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress

> concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act. (346 U. S. at 438).

Scherk admits that *Wilko* has been applied to both the Securities Act and the Exchange Act because the anti-waiver language of Section 29(a) of the Exchange Act is virtually identical to that of Section 14 of the Securities Act. (Petition, p. 8).

Scherk, however, contends that the 1970 adherence of the United States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U. S. C. § 201-208) somehow partially overrules or supersedes Section 29 of the Exchange Act and the *Wilko* doctrine even where, as here, the defendant committed a violation of the Act within the territorial jurisdiction of the United States. In advancing this argument, Scherk has failed to include the Convention in his Appendix. Had he done so, the invalidity of his position would have immediately become apparent.

A copy of the Convention is attached hereto as an Appendix. Not only do the Convention and Chapter Two of the Arbitration Act contain no hint of any intention to repeal Section 29(a) of the Exchange Act but the Convention explicitly negates any inference of repeal by providing that it is subject to the "law" and "policy" of the Contracting States; that a court of a Contracting State need not refer the parties to arbitration if it finds that the "said agreement is not valid under the law to which the parties have subjected it" or if "it finds that the said agreement is null and void." (Article V, para. 2; Article V, para. 1(a); Article II, para. 3.

Thus, by its express terms, the Convention is subject to such legislative and judicially declared exceptions to compulsory arbitration as are contained in Section 29(a) of the Exchange Act and the *Wilko* doctrine.

B. The Decision of the Court of Appeals Does Not Conflict with the Zapata Case.

In *M/S Bremen* v. *Zapata*, 407 U. S. 1 (1972) this Court upheld an agreement containing a foreign choice-of-forum provision. The *Zapata* decision, however, involved no alleged violation of a federal statute providing exclusive jurisdiction in the federal courts and containing an anti-waiver provision such as Section 29(a). Hence, the Court of Appeals properly held *Zapata* to be inapplicable here. (App. 7). Indeed, the Opinion of the Chief Justice, in *Zapata*, makes it clear that this Court would have held an arbitration clause invalid under such circumstances as are presented here:

> A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, e.g., *Boyd* v. *Grand Trunk W. R. R.*, 338 U. S. 263 (1949) (407 U. S. at 15).

In *Wilko* this Court held that an agreement to arbitrate a future securities dispute contravened Section 14 of the Securities Act, a "strong public policy . . . declared by statute", i.e., declared by the anti-waiver provision of the Act and the statutory right of the Securities Act claimant to seek relief in the federal courts. Indeed, the *Boyd* case cited in *Zapata* as an example of an unenforceable provision was expressly relied upon by this Court in *Wilko*. (346 U. S. at 437). In *Boyd* a contract binding an employee to waive or restrict his choice of venue under the F. E. L. A. was held invalid.

The decision of the Court of Appeals is in full accord with *Zapata* as well as *Wilko*.

C. This Court Should Not Reexamine the Wilko Decision.

Scherk's next suggestion in support of his Petition is that this Court should "reexamine" the *Wilco* doctrine and limit it to situations where the parties are "of different bargaining strength"

or where there are no foreign elements of the transaction. Section 29(a), however, voids "*any* condition, stipulation or provision binding *any* person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . .". Hence, this Court's decision in *Wilko* applied to all agreements to arbitrate future disputes arising under the Act. This Court did not read "any" to mean "some" (346 U. S. at 438), even though it recognized that under some circumstances a buyer and seller of securities may deal at arm's length on equal terms. (346 U. S. at 435.) Finally, if any earlier doubt existed on the question of whether corporations are entitled to invoke the benefits of the Exchange Act, this Court reaffirmed in *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U. S. 6, 10 (1971) that "the Act protects corporations as well as individuals who are sellers of a security."

D. The Decision of the Court of Appeals Will Have None of the Unexpected and Detrimental Consequences Alleged by Scherk.

Scherk predicts "widespread" and "detrimental" consequences flowing from the decision of the Court of Appeals, ignoring the fact that the fraudulent conduct complained of here occurred in large part within this country to the injury of an American company. Congress and the courts have traditionally and properly required foreigners who do business in this country to comply with American law, including the Securities Act of 1933 and the Securities Exchange Act of 1934, and have asserted jurisdiction over any violation of those laws. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280 (1952); *Travis* v. *Anthes Imperial Limited*, 473 F. 2d 515 (8th Cir. 1973); *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (2d Cir. 1972); *Roth* v. *Funds of Funds, Ltd.*, 279 F. Supp. 935 (S. D. N. Y., 1968), *aff'd*, 405 F. 2d 421 (2d Cir. 1968), *cert. den.*, 394 U. S. 975 (1969), *reh. den.*, 395 U. S. 941 (1969); *Ferraioli* v. *Cantor*, 259 F. Supp. 842 (S. D. N. Y. 1966); *SEC*

v. *Gulf Intercontinental Finance Corp.*, 223 F. Supp. 987 (S. D. Fla. 1963); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 17(a) (1965). If section 29(a) of the Exchange Act is to be repealed or modified to exclude all foreign nationals from its ambit, such a radical alteration of existing law should be effected by Congress. While it may be "detrimental" to a foreign defendant to be called to answer in the Courts of the country in which his violation was committed, such detriment affords no basis for overruling *Wilko* or Section 29a( ).

CONCLUSION.

The pending Petition fails to set forth any reason for the issuance of a Writ of Certiorari. The decision of the Court of Appeals does not conflict with any decision of this Court, with any decision of another Court of Appeals or with any statute. On the contrary, both the District Court and the Court of Appeals decided the controversy in accordance with the express provisions of Section 29(a) of the Exchange Act and this Court's Opinion in *Wilko* v. *Swan*. We respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

June 10, 1958

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise

between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copies thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the

party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling with the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent

authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or

accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

FILE COPY

MAR 7

MICHAEL ROBAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

v.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit are reported officially at 484 F.2d 611, and unofficially at [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,092, and are printed at pages App. 1 to App. 17 of the petition for certiorari. The opinion of the United States District Court for the Northern District of Illinois, Eastern

Division, is not reported either officially or unofficially. It is printed at pages App. 18 to App. 33 of the petition for certiorari.

JURISDICTION

The Seventh Circuit's judgment was entered on August 2, 1973. Petitioner's petition for rehearing in the Seventh Circuit, filed on August 16, 1973, was denied on October 18, 1973. The petition for a writ of certiorari was filed on November 15, 1973. Certiorari was granted on January 21, 1974. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

STATUTES AND CONVENTION INVOLVED

The statutes involved herein are the Federal Arbitration Act, 9 U.S.C. §§1, 2, 3, 201, 202, 206 and 208 (1970), and Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a) (1970), 48 Stat. 903. The convention involved herein is the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, September 30, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. The texts of these statutory provisions and the convention are reproduced in the Addendum to this brief.

QUESTION PRESENTED

Whether unambiguous contractual provisions requiring arbitration of an international commercial dispute, which provisions are the result of arm's-length bargaining by sophisticated businessmen and lawyers, are unenforceable merely because a claim, as yet not proven, has been made that the Securities Exchange Act of 1934 has been violated.

STATEMENT OF THE CASE

Respondent Alberto-Culver Company brought this action charging that the petitioner, Mr. Scherk, breached certain contractual warranties and violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j(b), Rule 10b-5 promulgated pursuant thereto, and common law. (A. 3-14.) Jurisdiction of the District Court was predicated upon Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1332. (A. 3, 11.)

Alberto-Culver is a Delaware corporation with its principal place of business in Melrose Park, Illinois. (A. 11.) Alberto-Culver manufactures and distributes toiletries and hair products in national and international markets. (A. 48, 58.) Mr. Scherk is a German citizen, residing in Switzerland. (A. 30.) Prior to selling his businesses to Alberto-Culver, Mr. Scherk lived in Berlin, West Germany and was engaged in the business of manufacturing and selling cosmetics in Europe. (A. 30, 48.) Mr. Scherk owned three European businesses: Firma Ludwig Scherk ("FLS"), a German sole proprietorship, located in Berlin, which manufactured cosmetics; Scherk Establissement Vaduz ("SEV"), a Liechtenstein business entity with no counterpart in American law, which was located in Liechtenstein and which licensed trademarks for cosmetics on an international basis; and Lodeva Herstellung und Vertrieb Kosmetischer Artikel Gmbh ("Lodeva"), a dormant German business entity with no counterpart in American law. (A. 3-4, 32, 48-49, 91.) Mr. Scherk does not own any property, has no residence and transacts no business in the United States. (A. 30.)

Alberto-Culver was interested in gaining an entree into the European market for its products and contacted Mr.

Scherk in Berlin in June of 1967 with a view toward acquiring Mr. Scherk's European cosmetic businesses. Negotiations were initiated and included a visit to Mr. Scherk in Berlin in November, 1967, by Mr. Fred Maeding, an Alberto-Culver representative. In December, 1967, Mr. Benjamin Navon, representing Mr. Scherk, met with Mr. Leonard H. Lavin, Alberto-Culver's president, in Chicago. An impasse was reached and negotiations terminated. (A. 30, 49-50, 90.)

In February, 1968, Alberto-Culver again contacted Mr. Scherk in Berlin and requested a resumption of negotiations. Negotiations resumed. (A. 30.) In March, 1968, Mr. Lavin met with Mr. Scherk in Berlin and the basic terms of the sale of the three businesses were established. (A. 83-84.) After the March meeting, difficulties arose as to the interpretation of the basic price and payment terms of the March agreement. Mr. James Nadler, an Alberto-Culver representative, tried unsuccessfully to settle the differences at meetings held in London and Berlin. (A. 84.) Finally, in May, 1968, at a meeting in Melrose Park, attended by Mr. Scherk, Mr. Lavin and others, the differences were resolved. (A. 31, 85-86.)

Subsequently, lawyers for the parties drafted definitive written contracts.*, (A. 31.) Alberto-Culver engaged two American law firms to work on this matter, the firm of Bell, Boyd, Lloyd, Haddad & Burns and the firm of Pattishall, McAuliffe and Hofstetter (A. 38-39), as well as, two European lawyers, Mr. Karlheinz Quack of Berlin (A. 52-53, 88) and Mr. Töndury of the Liechtenstein law firm of Präsidial Anstalt Vaduz (A. 87). An extensive investiga-

* The SEV contract is a 74-page document with a 13-page Annex and exhibits. The FLS contract is a 55-page document plus exhibits. (Exhibits 1 and 3 to Complaint, Record Document No. 2.)

tion and examination of the Scherk businesses was undertaken in Europe by and for Alberto-Culver. The books of the businesses were thoroughly examined by Peat, Marwick & Mitchell. Experts in West Germany, Austria, Great Britain and Liechtenstein were consulted with respect to the trademarks* and the value of the goodwill of the businesses. (A. 31, 32, 86-89.)

Finally, the contracts were completed and Mr. Scherk signed them in Vienna, Austria, in February, 1969. (A. 31.) The formal closing took place in Geneva, Switzerland, in June, 1969, when Alberto-Culver, represented by Mr. Walter Treumann (an attorney) and Mr. Nadler, delivered Alberto-Culver's payment — cash and four promissory notes**—to Mr. Scherk. (A. 31, 87.) Alberto-Culver acquired the assets of FLS and all of Mr. Scherk's interest in Lodeva. As to SEV, Alberto-Culver specified which assets it was buying, but for tax purposes required that the acquisition take place as a sale of stock. (A. 91-92.) Therefore, SEV was transformed into a stock company by Alberto-Culver's Liechtenstein lawyers acting as escrow agents. (A. 87-88, 92.)

In the FLS and SEV contracts, Alberto-Culver and Mr. Scherk agreed that any and all disputes arising con-

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*SEV and FLS owned some 275 trademarks effective in 10 European countries. One hundred and thirty were filed in Geneva, Switzerland, pursuant to the Treaty of Madrid for effect in various European countries. None of the FLS or SEV owned trademarks were registered or effective in the United States. (A. 33.)

**The promissory notes provide for payments to be made to Mr. Scherk in Geneva, Switzerland. The one negotiable note may not be negotiated without prior approval by Alberto-Culver and is restricted as to whom it may be sold or transferred. The other three notes are by their terms non-negotiable and must be surrendered to Alberto-Culver. (A. 62-68.)

cerning the transactions were to be arbitrated before the International Chamber of Commerce ("ICC") in Paris, France. (A. 19-20.)

In 1970, Alberto-Culver concluded that Mr. Scherk had breached his contractual warranties as to the trademarks owned by FLS and SEV. Instead of instituting arbitration as required by the contracts, Alberto-Culver brought suit in the United States District Court for the Northern District of Illinois, Eastern Division in June, 1971. Mr. Scherk moved in the District Court, pursaunt to 9 U.S.C. §3, for an order staying these proceedings pending arbitration (A. 27-29)*, and he instituted arbitration before the ICC in Paris on November 9, 1971. (A. 70.) On November 24, 1971, on the motion of Alberto-Culver (A. 69-72), the District Court enjoined Mr. Scherk from proceeding with arbitration before the ICC. (A. 81-83.) On December 22, 1971, the District Court denied Mr. Scherk's requested stay (A. 93), and on January 14, 1972, the Court again enjoined Mr. Scherk from proceeding with arbitration before the ICC. (A. 98-100.) Mr. Scherk appealed these orders. (A. 101-02.) The Seventh Circuit affirmed, Judge Stevens dissenting. (A. 102-03.)

SUMMARY OF ARGUMENT

At issue in this case is whether arbitration agreements, which are part of an international commercial transaction, are unenforceable merely because a claim is made that the Securities Exchange Act of 1934 has been violated.

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* Mr. Scherk also moved to dismiss the suit, *inter alia*, for lack of subject matter jurisdiction, for lack of personal jurisdiction and on the grounds of forum non conveniens. (A. 27-29.) The District Court denied the motion to dismiss. (A. 93.)

Alberto-Culver, an American corporation, was interested in gaining an entree into the European market and, to that end, it acquired the three European cosmetics businesses owned by Mr. Scherk. The acquisitions were consummated after several months of intensive investigation and negotiation. Each side had the assistance of its own lawyers, business consultants, accountants and other experts. The parties considered the possibility of future disputes and resolved that problem, fairly and intelligently, by agreeing to arbitrate any and all future disputes before the ICC in Paris. When a dispute actually arose, Alberto-Culver breached its agreement to arbitrate and instituted suit in the United States.

Were it not for this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), these arbitration agreements would have been enforced under the Federal Arbitration Act. 9 U.S.C. §§1-3. Indeed, in spite of *Wilko*, these agreements should have been enforced. In 1970, the United States acceded to the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards. Chapter 2 of the Federal Arbitration Act, in part, was enacted to require the enforcement of arbitration agreements in international commercial transactions. 9 U.S.C. §201 *et seq.* This recent statement of Congressional policy supersedes *Wilko* and should have been effectuated in this case.

Even if taken out of their international context, these arbitration clauses are enforceable. *Wilko* does not require a holding that the arbitration clauses at issue are unenforceable. *Wilko* involved an investor's suit against a brokerage house. This Court held that in such a case, when claims were made under the Securities Act of 1933, agreements to arbitrate future disputes would not be en-

forced. In *Wilko,* the concern was largely that customers dealing with brokerage houses do so at a serious disadvantage. In that particular case, the customer was faced with a form contract waiving his rights in advance. In the instant case, the arbitration agreement is the result of arm's-length bargaining by sophisticated businessmen and lawyers for a specific, negotiated transaction in which each side had equal bargaining power.

When the international context of the present case is added, this case is clearly beyond the ambit of *Wilko.* As this Court recognized in *M/S Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972), the certainty which results from forum selection clauses in international commercial dealings is not merely useful, but *indispensable* to such transactions. A refusal to enforce forum selection clauses arrived at in negotiated transactions by sophisticated businessmen, merely because a securities claim is made, must adversely affect American foreign commerce. An application of *Wilko* to a case such as this will decimate the policy underlying *Zapata.* Businessmen would be deprived of the right to establish certainty in international transactions by agreeing in advance upon the forum (here arbitration) for future disputes. It serves no purpose to impose that result on sophisticated businessmen. Furthermore, applying *Wilko* to the arbitration agreements of this case would effectively nullify Chapter 2 of the Federal Arbitration Act. Such results are unwarranted, unwise and should be avoided. The arbitration agreements, at issue here, should be enforced. Alberto-Culver should be required to live up to its bargain.

ARGUMENT

I.

THE FEDERAL ARBITRATION ACT REQUIRES THAT THE DISPUTE BETWEEN THESE PARTIES BE ARBITRATED ACCORDING TO THE PARTIES' EXPLICIT AGREEMENTS.

Alberto-Culver, an American corporation, deciding that it wanted to acquire related businesses in Europe in order to gain an entree into the European market for its products, voluntarily chose to go to Germany and approach Mr. Scherk, a German citizen and resident,* seeking to acquire his European cosmetic businesses. (A. 30, 49, 90.) After protracted negotiations which took place on both sides of the Atlantic Ocean, Alberto-Culver finally acquired these businesses in 1969. During their negotiations, the parties carefully considered the difficulties of handling future problems in this international context. The result was a reasonable, deliberate choice to arbitrate any and all disputes arising from the transactions before the ICC in Paris. (A. 19-20.)

However, once the instant dispute arose, Alberto-Culver decided that, rather than litigate in Paris in the mutually chosen forum, it preferred to litigate on its home ground. Accordingly, in patent violation of its contractual obligations, Alberto-Culver commenced this suit. Faced with litigation thousands of miles from his home, Mr. Scherk petitioned the District Court to halt the instant proceed-

* Mr. Scherk is still a German citizen, but in 1969 he became a resident of Switzerland.

ings pending the outcome of arbitration, and he commenced arbitration proceedings in Paris before the ICC. The District Court refused to stay its proceedings and enjoined Mr. Scherk from continuing the arbitration. The District Court should have granted Mr. Scherk's request for a stay.

It is settled national policy, 9 U.S.C. §1 *et seq.*, that arbitration is to be encouraged as a convenient, inexpensive and expeditious way in which to handle litigable disputes between private parties. See, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Arbitration clauses in commercial contracts, such as here, are not merely valid and enforceable, but also irrevocable. 9 U.S.C. §2. Such clauses are to be liberally construed, *Lundgren* v. *Freeman*, 307 F.2d 104, 110 (9th Cir. 1962), and all doubts are to be resolved in favor of arbitration. *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 385 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961). The definition of "commerce" in the Federal Arbitration Act includes international commerce. 9 U.S.C. §1.

Significantly, Congress was not satisfied with Chapter One of the Federal Arbitration Act as its sole statement of policy concerning arbitration in international commercial matters. In 1970, having considered the appropriateness of, and the benefits to be gained from, arbitration in the international context, Congress enacted Chapter Two of the Federal Arbitration Act. 9 U.S.C. §201 *et seq.* Chapter Two provides that an international commercial contract providing for arbitration is enforceable and irrevocable. 9 U.S.C. §§202, 208. The courts of the United States are to compel such arbitration proceedings. 9 U.S.C. §§206, 208.

Congress specifically enacted Chapter Two of the Federal Arbitration Act to enable the United States to become a party to the 1958 United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (the "UN Convention"). 9 U.S.C. §201. As its title indicates, the UN Convention is the basis for an international effort to provide enforcement for both international arbitration agreements and awards. (See Articles II and III.) As of December 29, 1970, thirty-seven countries had signed the UN Convention. See [1970] 3 U.S.T. 2561-66.

The arbitration agreements in the case at bar are clearly enforceable by the express language of both Chapter One and Chapter Two of the Federal Arbitration Act and Article II of the UN Convention. The District Court and the Seventh Circuit refused to enforce the unambiguous arbitration agreements in this case solely because of this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953). (See Appendix to Petition for Certiorari,* App. 6-7, 31-32.) In *Wilko*, this Court held that an agreement to arbitrate future disputes was unenforceable when a claim was made under the Securities Act of 1933, 15 U.S.C. §77a *et seq.* (the "1933 Act"), by a customer against a brokerage house. It is the position of the Petitioner that, although *Wilko* is applied to bar arbitration of strictly domestic disputes, *Wilko* need not and should not be applied to international disputes. In view of the expanding scope of the federal securities laws, the application of *Wilko* to international disputes will effectively nullify Chapter Two of the Federal Arbitration Act and frustrate this country's decision to join in the UN Convention. That result is unwarranted, inappropriate and unwise.

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* Abbreviated hereinafter as "Cert. Pet. App."

II.

WILKO DOES NOT PROPERLY APPLY TO THIS CASE AND SHOULD NOT BE EXTENDED TO COVER THIS CASE.

The sole authority for the refusal of courts below to enforce these arbitration agreements is *Wilko* v. *Swan.** In *Wilko*, this Court was interpreting §14 of the 1933 Act, 15 U.S.C. §77n. There a customer of a brokerage house, Hayden, Stone & Co., brought suit under §12(1) and (2) of the 1933 Act, 15 U.S.C. §77*l*, for fraud in the sale of securities to him by Hayden, Stone. The customer had earlier signed a seventeen-page form contract with Hayden, Stone, which contained an arbitration clause along with numerous other provisions which waived protections of the federal securities laws. 201 F.2d at 445. This Court decided that, in controversies under the 1933 Act, agreements to arbitrate future disputes were unenforceable. Since the language of §14 of the 1933 Act is similar to that of §29(a) of the Exchange Act, 15 U.S.C. §29cc(a), courts have selectively applied *Wilko* to Exchange Act cases.**

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* The District Court in *Wilko*, 107 F.Supp. 75 (S.D. N.Y. 1952), was reversed by the Court of Appeals, 201 F.2d 439 (2d Cir. 1953), which in turn was reversed by this Court.

** *Wilko*, however, has not been applied unsparingly or uncritically. Instead, courts have, for the most part, cautiously considered each case and noted distinguishing features in cases which do not square with the rationale behind *Wilko*.

Wilko has been limited to agreements to arbitrate future disputes, leaving parties free to decide to arbitrate existing controversies. *Reader* v. *Hirsch & Co.*, 197 F.Supp. 111 (S.D. N.Y. 1961); *Berens* v. *Bache & Co.*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,387 (S.D. N.Y. 1974). As to disputes between broker-dealers

While the result in *Wilko* may have been appropriate under the facts of that case, there are several significantly different factors in the case at bar which, petitioner submits, are grounds for finding that *Wilko* does not apply to this case and should not be extended to do so.

First: *Wilko* involved a situation where there was considerable disparity in the bargaining power of the respective parties, along with an apparently egregious form contract used by the stronger party. The arbitration agreement as part of this form contract was not the result of individualized bargaining. Here, however, the arbitration agreements were reached through arm's-length bargaining between sophisticated businessmen and lawyers. Alberto-Culver was represented by two American law firms. (A. 38-39.) Detailed contracts for this one occasion were negotiated over a period of several months.* The

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(Footnote continued)

who are members of stock exchanges whose rules provide for arbitration, agreements and exchange rules providing for arbitration have been enforced. *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972). A nonmember can force a member firm to arbitrate. *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971); see also *Financial House, Inc.* v. *Otten*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,395 (E.D. Mich. 1973). Courts have refused to apply *Wilko* when the parties to the agreement to arbitrate are sophisticated businessmen dealing at arm's-length with equal bargaining power. *GCA Corp.* v. *Coler*, [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,339 at 91,815 (S.D. N.Y. 1972); see *Alco Standard Corp.* v. *Benalal*, 345 F.Supp. 14, 24 (E.D. Pa. 1972) (dictum). Courts have even examined the validity of the securities claim presented and, upon finding that the claim is specious or a sham, have enforced arbitration. *Waldman* v. *Shearson, Hammill & Co.*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,396 (D. N.J. 1974).

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*The contracts are Exhibits 1 to 4 to the Complaint. (Record Document No. 2.)

parties had equal bargaining power. Rather than being confronted with a take-it-or-leave-it, one-sided contract drafted for Mr. Scherk, Alberto-Culver as the buyer protected itself by requiring a host of warranties. *

Some courts would not apply *Wilko* in this situation. *GCA Corp.* v. *Coler,* [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,339 (S.D. N.Y. 1972); *Alco Standard Corp.* v. *Benalal,* 345 F.Supp. 14, 24 (E.D. Pa. 1972) (dictum). As the Court said in *GCA Corp.* v. *Coler*:

> "This court agrees with the contention of GCA that the public policy offended by a brokerage house customer's relinquishment of his right to sue in the courts is not offended by a similar relinquishment made between parties who deal at arm's length from equal bargaining positions." CCH ¶93,339 at 91,815.

Second: In *Wilko,* one of this Court's concerns was, in the words of dissenting Judge Stevens, "that the 1933 Act was intended to give special protection to the relatively uninformed, individual investor." (Cert. Pet. App. 10.) This Court stated in *Wilko* that "[i]ssuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers." 346 U.S. at 435. Here, that is not the situation. Alberto-Culver was well informed on all aspects of this relatively major acquisition. Not only was Alberto-Culver represented in the negotiations by two law firms, but also it had its own accountants, Peat, Marwick & Mitchell, do an independent audit, and it conducted an extensive examination of the businesses, consulting various experts before closing the deal. (A. 31-32, 38-39, 86-89.)

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* The trademark warranties in the FLS contract run for eleven pages, and in the SEV contract for fourteen pages. (Exhibits 1 and 3 to Complaint, Record Document No. 2.)

Third: *Wilko* involved a "garden variety" securities transaction, the customer buying stock from Hayden, Stone. Here, Alberto-Culver was buying three European cosmetic businesses. It acquired the assets of FLS. (A. 4.) SEV was transformed into a stock company by Alberto-Culver's attorneys for Alberto-Culver's tax planning needs. (A. 87-88, 91-92.) Part of the consideration for Mr. Scherk was for deferred payment under some promissory notes. (A. 62-68.) Petitioner does not seek a review by this Court of the lower courts' determination that this case involves securities, although petitioner does not agree with this determination. However, in analyzing the question of whether to enforce or not enforce the arbitration provisions in this case, the form of the transactions should not obscure their substance and economic reality. See *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). As Judge Stevens said, in "negotiated transactions [such as these] the transfer of securities is a function of the form in which the parties elect to cast their transaction. . . ." (Cert. Pet. App. 12.) It is inequitable to permit Alberto-Culver to direct the form of these transactions and then use that form to nullify those contractual commitments which it no longer finds convenient.

Fourth: While §14 of the 1933 Act was read by this Court in *Wilko* to make unenforceable arbitration agreements for future disputes, an interesting difference between the 1933 Act and the Exchange Act provides a reason for not interpreting §29(a) in the same way. Section 14 of the 1933 Act says that one cannot waive one's rights under that Act. 15 U.S.C. §77n. Congress in §12 of the 1933 Act specifically provided for private suits for violations of the 1933 Act, and shifted the burden of proof. The seller of a security is required to prove that "he did not know, and in the exercise of reasonable care could

not have known, of such untruth or omission." 15 U.S.C. §77*l* (2).

Here, Alberto-Culver bases its action upon Rule 10b-5. Congress did not provide a private civil remedy for violation of §10(b) of the Exchange Act or Rule 10b-5. The civil remedy for Rule 10b-5 has been implied by the courts. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971). Thus, while it is reasonable to interpret §14 of the 1933 Act as prohibiting a waiver in advance of a dispute of one's right to go to court, it is also reasonable not to interpret §29(a) of the Exchange Act the same way, particularly when, as here, all of the other policy considerations of *Wilko* are absent.

Consequently, even if this were a strictly domestic situation, which it is not, *Wilko* should not be applied to this case, and the arbitration provisions should be enforced.

III.

IMPORTANT POLICY CONSIDERATIONS DICTATE THAT WILKO SHOULD NOT BE APPLIED TO INTERNATIONAL TRANSACTIONS.

Perhaps the most important distinction between *Wilko* and this case is that *Wilko* was decided solely in a domestic context, whereas the current dispute involved an international commercial transaction. The international nature of this situation and the attendant policy considerations, as enunciated by this Court in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and Judge Stevens in his dissent in this case, are so important that they predominate over all others and compel arbitration here. For as Judge Stevens said, the enforcement of the arbitration agreements in this case will not frustrate

the policies of the Exchange Act, whereas refusal to enforce the arbitration agreements will frustrate the important policies set out in *Zapata*. (Cert. Pet. App. 16, n. 13.)

In *Zapata*, this Court determined that, in *international* commercial matters, agreements as to choice of forum were valid and would be enforced. This Court stated that forum selection clauses:

> "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." (Footnote omitted.) 407 U.S. at 10.

This, the Court noted, is particularly so, when as in the instant case, the agreement is the result of arm's-length bargaining by sophisticated businessmen. Indeed, this Court recognized that such a clause "is an indispensable element in international trade, commerce, and contracting." 407 U.S. at 13-14. Such clauses serve many useful purposes. The parties are able to determine which of the many possible forums to which they are exposed will hear any dispute. Thus, the parties can know in advance where disputes will be heard, what type of tribunal will be used, and what the outlook of that forum may be. The parties may also be able to select a neutral forum, which is mutually satisfactory to each.

In an age of ever-increasing world commerce, the necessity for all countries to enforce forum selection clauses is exceedingly important, and the exceptions to such enforcement should be few, limited, and absolutely necessary. As this Court stated:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our

courts. . . . We cannot make trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts." 407 U.S. at 9.

This Court did say that in particular cases forum selection clauses would not be enforced if a sufficiently strong public policy intervened. Not every domestic public policy consideration, however, will be sufficiently important to justify nonenforcement of a forum selection clause. It is extremely significant that in *Zapata* this Court concluded that the forum selection clause should be enforced even though the selected tribunal would enforce an exculpatory clause for negligence which would not be enforced in the United States because it violated domestic public policy.

Alberto-Culver suggested in the appeal in the Court below that the policies behind *Wilko* and §29(a) of the Exchange Act were sufficiently compelling to justify the nonenforcement of the arbitration agreements in the instant case. Petitioner disagrees. The express language of §29(a) does not require that result. Furthermore, as already discussed, none of the discernible policy bases of *Wilko* are applicable to this dispute. Alberto-Culver did not waive the protection of the Exchange Act. It did, however, knowingly, intelligently and voluntarily agree to arbitrate rather than litigate in the United States.*

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* Alberto-Culver has always premised its argument that the arbitration agreements were not enforceable on the *Wilko* decision. Alberto-Culver has not asserted that it would be unreasonable to enforce the arbitration provisions. Nor has it asserted any fraud in the inducement of the arbitration provisions which would justify non-enforcement of them under *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The exception Alberto-Culver would urge to the general rule seen in *Zapata* would decimate the rule. The only reason the courts below refused to enforce the arbitration agreements here is that Alberto-Culver cloaked a traditional claim for alleged breach of warranties with Rule 10b-5. There can be no question about the fact that there has been a phenomenal growth of securities litigation in the last fifteen years. It is also clear that the term "security" as used in the Exchange Act, 15 U.S.C. §78c(a)(10), has been given an increasingly broad definition, particularly under the catch-all phrase "investment contract." *Tcherepnin* v. *Knight*, 389 U.S. 332, 338 (1967). Thus, "securities" are necessarily present in a great variety and in a vast number of international commercial transactions.* It will take no particular skill to frustrate the intention of the parties to such transactions who adopt forum selection clauses by merely pleading the presence of a securities claim if any dispute should arise.

The exception urged below by Alberto-Culver will not only subvert the *Zapata* rule, but it will also effectively

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*The term "security" for the purposes of the Exchange Act has been found to include the following: withdrawable capital shares in a savings and loan association, *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967); loan participation agreements, *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (5th Cir. 1969); Scotch whiskey warehouse receipts, *SEC* v. *M. A. Lundy Associates*, 362 F.Supp. 226 (D.R.I. 1973); pyramid sales distribution agreements, *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, ... U.S. ..... (10/9/73); contracts for purchasing and raising beavers, *Continental Marketing Corp.* v. *SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968); purchase of restaurant property, *Huberman* v. *Denny's Restaurants, Inc.*, 337 F. Supp. 1249 (C.D. Calif. 1972); short term promissory notes, *Sanders* v. *John Nuveen & Co.*, 463 F.2d 1075 (7th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972).

nullify Chapter 2 of the Federal Arbitration Act and substantially frustrate this country's participation in the UN Convention. Alberto-Culver is asking for adoption of exactly the parochial concept this Court deplored in *Zapata*—the belief that Americans can go out into world trade and yet insist that all disputes be decided at home under our laws. 407 U.S. at 9. That attitude, if adopted by this Court for the vast array of international securities transactions, is bound to hinder the development of American overseas trade and commerce. As Judge Stevens said:

> "[a]n excessively paternalistic attitude toward American overseas investment will inevitably make American capital less attractive to foreign firms." (Cert. Pet. App. 10.)

Finally, the result reached by the Court of Appeals for the Seventh Circuit adversely affects the credibility of American business and the American judicial system. Simply stated, under its agreements with Mr. Scherk, Alberto-Culver agreed to arbitrate in Paris before the ICC. Now after it raised a dispute with Mr. Scherk with respect to those agreements, Alberto-Culver says that it must be afforded an absolute right to renege on its agreement. Our judicial system should not let sophisticated American businesses go abroad to do business, enter into solemn agreements with foreigners and then break those agreements. Judicial sanction of this sort of arrogant behavior will not only injure the unsuspecting foreigner who contracted in good faith when he finds himself the victim of an idiosyncracy of American law, but also will injure American businessmen wanting to do business with foreigners, who will find themselves heirs to a legacy of distrust.

CONCLUSION

Petitioner respectfully requests this Court to reverse the decisions below denying the stay under 9 U.S.C. §3 and enjoining arbitration, and to remand the case with instructions to enter the stay and compel arbitration.

Dated: March 6, 1974

Respectfully submitted,

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ADDENDUM

The Federal Arbitration Act, 9 U.S.C.

Section 1.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 201.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202.

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 206.

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 208.

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Securities Act of 1933, Section 14

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934, Section 29(a)

Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Add. 4

UNITED NATIONS

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

June 10, 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency

of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

Petitioner,

—v.—

ALBERTO-CULVER COMPANY,

Respondent.

MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the American Arbitration Association (hereinafter AAA or Association) hereby respectfully moves for leave to file a brief annexed hereto as *amicus curiae* in this case. The written consent of petitioner has been obtained. The consent of respondent was requested but refused.

The AAA, founded in 1926, is an educational membership organization incorporated under the Not-For-Profit Corporation Law of the State of New York. Its purposes, among others, are to promote the knowledge and effective use of international commercial arbitration throughout the United States and other countries of the world. It has had extensive experience, along with such long-established institutions as the International Chamber of Commerce

(ICC), in conducting arbitrations arising from international business agreements.

From the time the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in 1958, the Association was in the forefront of organizations recommending accession to it by the United States. At the request of the State Department, the AAA convened an *ad hoc* committee of international arbitration experts to draft the proposed language for Chapter 2 of the United States Arbitration Act. This implementing legislation was required before the treaty could be ratified.

The Association believes that this is the first case in which this Court has been asked to determine the arbitrability of an international commercial agreement since the Convention and the Act became law in the United States. The interest of the international business community in the issues here involved far transcends the interests of the immediate litigants. If the Court were to uphold the decision of the United States Court of Appeals for the Seventh Circuit, it would impair the ability of American businessmen to freely negotiate and bargain for arbitral resolution of international commercial disputes and would force them to have recourse to the formalities and complexities of foreign court proceedings.

The AAA is not concerned with the outcome of this case as it affects the parties but with the prompt and effective enforcement of international agreements to arbitrate. It believes that it is in a position to be of assistance in calling to the Court's attention the broader implications of Convention and Act than have been or will be presented elsewhere.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, the AAA respectfully requests that this motion be granted.

Dated: March 6, 1974

Respectfully submitted,

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Chairman, Arbitration Law Committee

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In the

Supreme Court of the United States

October Term, 1973

No. 73-781

Fritz Scherk,

Petitioner,

—v.—

Alberto-Culver Company,

Respondent.

BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus*

This brief *amicus curiae* is filed on behalf of the American Arbitration Association, an educational membership organization, founded in 1926 and incorporated under the Not-for-Profit Corporation Law of the State of New York. The AAA has accumulated much knowledge and experience in the administration of international commercial arbitration. Among the Association's purposes are the fostering and promotion of the effective use of international arbitration. In furtherance of this purpose, the AAA was in the forefront of organizations recommending accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(U.N. Doc. No. E/Conf. 26/9 Rev. 1, 6/10 [1958]).[1] This Convention, *inter alia*, provided for prompt and effective enforcement of voluntary international agreements to arbitrate.

Amicus has no direct interest in the administration of the international arbitration between the parties. Under the agreement at issue, the controversy is to be administered not by the AAA but rather by a leading international organization, the International Chamber of Commerce (ICC). Nor has the AAA any interest in the *merits* of the dispute. The only concern of the Association is in having our judicial system grant the fullest recognition to the enforcement of international agreements to arbitrate.

This case presents the first opportunity for the Court to consider the Convention on the Recognition and Enforcement of Foreign Awards. As a necessary incident to enforcement of such awards, this Treaty provides for specific enforcement of voluntary international arbitration agreements. The decision in this case is likely to have a substantial impact upon the ability of businessmen to opt for arbitration as the exclusive method of settling their disputes and to avoid the complex and uncertain proceedings of foreign courts. For these reasons, the American Arbitration Association is filing this brief.

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[1] The U.N. was not a "controlling factor in this Convention; the title is purely formal. The "convention itself and the legal aspects of it" were a "matter of negotiation among the member States" (116 Cong. Rec., 91st Cong., July 6, 1970, p. H6335). The text of the Convention is appended to the Petitioner's Brief.

Summary of Argument

The international treaty here involved, ratified by the United States in 1970, reflects the official policy of this country to encourage the settlement of international disputes by arbitration. When, to implement it, Congress added a whole new chapter to the U.S. Arbitration Act, it intended the federal courts to give the fullest recognition possible to arbitral forums bargained for by the parties to international commercial agreements.

International arbitration is a desirable method for dispute settlement between parties of different countries and legal systems and is often greatly superior to available alternatives of local court proceedings. Unless an arbitration clause is invalid on its face, only the most pressing of public policy considerations should lead a United States court to prohibit its enforcement. The securities aspect of the agreement herein, entered between parties of equal bargaining power, does not afford a basis for prohibiting arbitration of a dispute arising thereunder.

ARGUMENT

Introduction

The Importance of International Commercial Arbitration

The Honorable Circuit Court Judge Stevens, in the dissent below, states that, "Since 1953 the policy of encouraging the settlement of disputes by arbitration has received increasingly strong endorsement" (484 F.2d 611, 616). In the international field, to meet the expanding overseas activities of American business enterprises, and with broad support from leaders of the bar, of industry, labor and business (116 Cong. Rec., 91st Cong., July 6, 1970, p. H6335), President Johnson, in 1968, urged upon Congress the enactment of Chapter 2 of the U.S. Arbitration Act (9 U.S.C. §§201 et seq.), the implementing legislation required before the United States could ratify the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards—which had first been promulgated in 1958. By 1970, this country had become a party to it.

That the enforcement of international arbitration is raised to the level of government policy is supported by the U.S.-U.S.S.R. Trade Agreement of 1972 which provides that:

> "Both governments encourage the adoption of arbitration for the settlement of disputes arising out of international commercial transactions concluded between natural and legal persons of the United States of America and foreign trade organizations of the Union of Soviet Socialist Republics" (67 Dep't State Bull. 595,597 [1972]).

Similar expressions of policy are included in the U.S.-Polish Agreements of 1972. (See U.S. Dep't of Commerce News Fact Sheet, Joint American-Polish Trade Commission, Second Sess., November 4-5, 1972.)

The American Bar Association, which had recommended that the United States become a party to the Convention as far back as 1960, has, since its ratification, continued to promote international commercial arbitration. As recently as February of this year, its House of Delegates adopted a Resolution pursuant to which the Association "calls upon all appropriate organizations of lawyers" of nonparticipating countries to encourage their respective Governments to make their countries parties to the Convention (Amer. Bar Ass'n, Section and Committee Reports to the House of Delegates, 1974 Midyear Meeting, Houston, Texas, pp. 101 b. et seq.).[2]

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[2] The complete Resolution reads as follows:

BE IT RESOLVED, that the American Bar Association calls upon all appropriate organizations of lawyers of the countries of the world which have not acceded to or ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbital Awards to convey to their respective Governments their expression of support for this Convention and to encourage their respective Governments to take whatever actions are necessary and appropriate to secure the accession or ratification of this Convention by their respective countries; and

BE IT FURTHER RESOLVED, that the President of the American Bar Association cause a copy of this Resolution to be forwarded to the appropriate organizations of lawyers of the relevant countries of the world.

POINT I

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as Implemented by Chapter 2 of the United States Arbitration Act (9 U.S.C. §§201 *et seq.*),[3] Requires a Federal District Court to Honor the Present International Arbitration Agreement.

A. *The Convention Demonstrates Beyond Peradventure That the Contracting Countries Intended to Permit the Nonenforcement of an International Arbitration Agreement Upon Only the Narrowest Grounds.*

Article II provides that arbitration will be prohibited only if the agreement is:

1. "null and void"
2. "inoperative"
3. "incapable of being performed" [par. 3]

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[3] This chapter has as its sole function the responsibility of implementing the Convention. The two are obviously interdependent. Thus, section 201 recites that the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." The Act not only reaffirms that this Treaty is the law of the land but also vests in the Federal courts—as opposed to state courts—jurisdiction over proceedings in connection with foreign arbitration agreements and awards.

Despite their interdependence, the Act goes beyond the Convention in many ways, a circumstance which demonstrates with what favor arbitration is looked upon by Congress. For instance, the Act authorizes the courts not only to "direct" arbitration in whatever place the agreement provides and regardless of "whether that place is within or without the United States" (§206) but also to "confirm" the award (§207)—procedures not specifically provided for in the Convention.

or it concerns

4. a "subject matter [not] capable of settlement by arbitration" [par. 1].

The Convention makes no attempt to define the types of agreements that the contracting countries are required to recognize and enforce. The coverage of arbitration agreements, in light of the breadth of the Convention itself, is necessarily very broad; clearly, only "nugatory" contracts are excluded. (Quigley, *Convention on Foreign Arbitral Awards,* 58 ABA J. 821, 822 [1972]).

The contracting countries did, however, allow themselves some leeway in the requirement above that the agreement concern "a subject matter [not] capable of arbitration" (Art. II, par. 1). This clause was inserted "in order to take proper account of the laws in force in many countries which prohibit the submission of certain questions to arbitration" (S. Exec. E, 90th Cong., 2nd Sess. [1968] p. 19). Were there a statute, for instance, which in so many words prohibited the submission to arbitration of a particular question or subject, the Convention would manifestly not be applicable. There is in the present case no such statute. Even the 1934 Securities Exchange Act which is peripherally involved (15 U.S.C. §78cc[a])—since the business being sold was to be converted into a stock corporation—contains no such explicit prohibition.[4]

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[4] In *Wilko* v. *Swan* (346 U.S. 427, 74 S. Ct. 182, 98 L.E. 168 [1953]), upon which the respondent relies, although the Court interpreted the 1933 Securities Act (15 U.S.C. §77n) there involved—which is similar to the present—as prohibiting arbitration, the rationale of its decision was based, not so much upon hostility to arbitration in security matters, as upon protection of an investor in light of the overweening bargaining power of his broker opponent.

Nor may it be said that an international arbitration agreement would offend the public policy of the United States simply because the parties agreed to arbitrate a transaction involving securities. Indeed, in the *Wilko* case, discussed above (p. 11, fn. 4), Mr. Justice Jackson was of the view that, after a "controversy arose," the "parties could agree upon arbitration in securities matters" (concurring opinion, 346 U.S. at p. 438; 74 S. Ct. at p. 189; see also, *Moran* v. *Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624 [1966]). It is significant, in this connection, that, some 17 years after *Wilko*, when it enacted Chapter 2 of the U.S. Arbitration Act to implement the Convention, Congress did not exclude from arbitration all international agreements dealing with securities. If that had been its intent, it could certainly have said so.

B. *The Present Arbitration Provision in Each of the Agreements Here Involved Comes Within the Ambit of the Convention and the Implementing Legislation Contained in Chapter 2 of the Arbitration Act.*

Quite different is the present situation from *Wilko* where a small investor, possessing little of the information available to a large brokerage concern, was bound to an arbitration agreement contained in the fine print of a 17-paragraph margin agreement. In the present case the arbitration agreement falls foursquare within the terms of the Convention and the Act. Here, "experienced and sophisticated businessmen," one American and one a German national, engaged in an "arm's-length negotiation." (Cf. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92

S. Ct. 1907, 32 L. ed.2d 513 [1972].) It is foreseeable in a transaction of this kind that disputes may arise about the assets included in the sale and, typically, an arbitration clause is bargained for and written into the contract of sale. If the parties disagree, among other things, about the promptness of delivery or payment or about the content of any warranties, they may provide for an agreed forum and means to settle their differences.

That is precisely what happened here. The parties came up with an artfully drawn arbitration agreement—not simply a form—which named a neutral country as the place for arbitration, before a well-established tribunal—the ICC—and specified the substantive law to be applied, that of the State of Illinois—which under the supremacy clause, of course, becomes the federal law.[5]

Although their contract of sale is alleged by the respondent to have been fraudulently induced, there is no claim of fraud in the making of the agreement to arbitrate itself. (Cf., e.g., *Prima Paint* v. *Flood & Conklin,* 388 U.S. 395,

[5] The arbitration clause reads in this way:

"The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

87 S. Ct. 1801, 18 L. ed.2d 1270 [1967].) Nor is there any contention that the contract between them is otherwise "null and void" or "inoperative." Accordingly, unless the securities aspect of the agreement be controlling—and we have sought to show that it is not—there is no question but that the contract falls clearly within the terms of both (1) the Convention which requires that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration" existing or future controversies arising thereunder (Art. II, par. 1) and (2) the Act, which undertakes to enforce arbitration agreements "falling under the Convention" (9 U.S.C. §202).[*]

C. *Arbitration Is Especially Important in International Transactions Because the Alternatives Are Often Unsatisfactory.*

This Court in *The Bremen* v. *Zapata Off-Shore Co.* (497 U.S. 1, *supra*) recognized that, in the light of present day commercial realities and expanding international trade, parties to international commercial transactions should be free to select their own methods of settlement of disputes. The use of arbitration is not only a convenient device to

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[*] In the interests of completeness, it should be noted that the agreement here in litigation was entered into in 1968, two years before the Convention became effective for the United States, although the request for arbitration was initiated subsequent thereto. However, in our view, there is no reason not to apply the Convention retroactively; in fact, the delegates to the Convention dealt specifically with this very question. (See Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Summary Analysis of Record of U.N. Conference, May/June 1958, p. 85; Quigley, *Convention on Foreign Arbitral Awards*, 58 ABA J. 821, 822 [1972]; cf., also, *The Island Terr. of Curacao* v. *Solitron Devices, Inc.*, —— F.2d ——, decided December 12, 1973 [2d Cir., Doc. No. 73-1664].) Thus, a proposal to include the language, "This Convention shall apply only to arbitral awards rendered after the entry into force of the Convention" (E/Conf. 26/SR. 21, p. 2), was voted down (Haight, p. 86) and the Convention contains no prospective language. It is only reasonable, therefore, to interpret it as applying retroactively to arbitration agreements previously executed.

meet this objective; arbitration is often greatly superior to adjudication by local courts—in terms of:

(1) neutrality of forum

(2) avoiding problems of personal jurisdiction

and above all,

(3) enforcement of the award.

(See, e.g., Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States,* 4 International Lawyer 720, 737-739 [1970]; Govindaraj, *Foreign Arbitral Awards and Foreign Judgments Based Upon Such Awards,* 13 Int. & Comp. L.Q. 1465 [1964].)

D. *The Courts of the Contracting Countries Should Be Reluctant to Find International Arbitration Agreements Unenforceable on Public Policy Grounds.*

The court of an enforcing country may, it is true, refuse enforcement of an arbitration agreement which it finds offends its foreign policy (Art. V, par. 2[b]; see Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of U.N. Conference,* May/June 1958, p. 28; S. Exec. E, 90th Cong., 2d Sess. [1968] p. 19)). In so doing, however, the exercise of the utmost "good faith" is necessary. As has often been said, the "public policy" provision "in effect relegates the efficacy of the convention to the good faith of contracting states." (Quigley, *Convention on Foreign Awards,* 58 A.B.A. J. 821, 825 [1972]; see also, Evans & Ellis, *International Commercial Arbitration,* 8 Tex. Int. L.J. 17, 55 [1973]; Quigley, *United Nations Convention,* 90 Yale L.J. 1049, 1070 [1961].) Undoubtedly, the "efficacy of the con-

vention" would be gravely impaired if the "public policy" prohibition were too freely resorted to by contracting countries. For instance, an enforcing state could hardly be said to be acting in "good faith" if it permitted a contracting party to delay arbitration by time-consuming court actions in which counsel urged nonarbitrability on specious grounds of fraud (cf., e.g., *Matter of Weinrott* [*Carp*], 32 N.Y.2d 190, 344 N.Y.S.2d 848 [1973]) or made other elaborate efforts to establish that a controversy which the parties had agreed to arbitrate was nonarbitrable through some forced construction of a statute of the forum country. As we have sought to show (*supra*, p. 12), the only possible public policy argument here advanced, the securities aspect of the agreement, does not justify the nonenforcement of the arbitration clause.

E. *The Convention's Purposes Would Be Thwarted If the Court Refused to Permit Arbitration in This Case.*

Before concluding, we would urge the Court to consider the effect of an affirmance in this case. If the United States is overready to defeat, on public policy grounds, an international arbitration agreement sought to be enforced by a foreign contracting party, it must expect its own nationals to be subject to the same treatment in the courts of foreign enforcing countries. (See, e.g., Sultan, *U.N. Arbitration Convention and U.S. Policy*, 53 Am. J. Int. L. 807, 825 [1959]; see also, discussion of *Golodetz* v. *Serajuddin* [reported in AIR 1963 SC 1044] in Report of Committee on Commercial Arbitration of Ministry of Commerce, Government of India, pp. 28-30 [1964].)

In other words, under well-settled principles of reciprocity, the nonrecognition of arbitration agreements by the United States becomes a double-edged sword. While

in the present case the American litigant appears to prefer to avoid arbitration and the European prefers to use it, in the next case it may be the American who seeks to enforce an arbitration clause or to stay a foreign court proceeding. Moreover, when an American businessman is competing with, say, a Swedish businessman for a contract with a German businessman, the American may well feel himself at a substantial disadvantage if he has to admit that an arbitration clause he might sign would be void in his own country.

Beyond that, an affirmance would open the door to delaying tactics through challenges to all kinds of international arbitration agreements, not only where securities are involved, but also in other areas where the arbitrability of contracts has been questioned, with varying success, in both state and lower federal courts. (See, e.g., *Kavit* v. *A. L. Stamm & Co.*, —— F.2d ——, [decided Jan. 22, 1974] N.Y.L.J., Vol. 171, No. 35, p. 1, col. 7; *Matter of Fotochrome, Inc.*, —— F. Supp. —— [E.D.N.Y. 1973], decided Sept. 20, 1973 [255 Bankruptcy Law Rep.]; *Lawson Fabrics, Inc.* v. *Akzona, Inc.*, 355 F. Supp. 1146 [1973]; *Alco Standard Corp.* v. *Benalal*, 345 F. Supp. 14 [1972]; *Landegger* v. *Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692 [1972]; *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968 [1968].)

CONCLUSION

The purpose of international arbitration is to provide a speedy, economical and final determination of disputes arising out of international arbitration. In the present case, a copy of the respondent's request for arbitration was served upon the petitioner on November 15, 1971 (Appendix, p. 70). It is now more than two years later, and the controversy has not yet been heard by arbitrators. This is precisely the type of delay that the Convention and Act were designed to avoid.

It should be remarked, moreover, that the Convention makes international arbitral awards more secure than judgments of local courts, because all the parties to the Treaty have undertaken to enforce such awards, while very few have undertaken to enforce foreign judgments. Any undermining of the Convention by a disregard of arbitration agreements freely entered into would be a substantial setback for dispute settlement on the international scene.

Rather than fostering arbitration as the long-approved method of settling commercial controversies, the court is, it would seem, being asked by the respondent to initiate a return to the "old judicial hostility to arbitration" which the courts were urged to "shake off" more than 30 years

ago. (*Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 [2d Cir. 1942, per Frank, J.].)

Date: Mar. 6, 1974

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT ALBERTO-CULVER COMPANY IN OPPOSITION TO MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Respondent, Alberto-Culver Company, objects to the motion of the American Arbitration Association ("AAA") which requests leave to file an *amicus curiae* brief in support of the Petitioner, Fritz Scherk.

This case is based upon fraudulent acts *committed within the United States* by a foreign national, Fritz Scherk, in a sale of securities to a United States citizen, Alberto-Culver Company, in violation of Section 10b of the Securities Exchange Act of 1934 ("Exchange Act"), and the relief sought is recission of the sale. The agreement of sale expressly provided that "the laws of the State of Illinois, U.S.A., shall apply to and govern this agreement . . ." The sale occurred in 1969, prior to the adoption by Congress of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Five months after the Respondent filed its suit in the U.S. District Court, Scherk commenced proceedings for arbitration of the controversy before the International Chamber of Commerce ("ICC"). As does Scherk, the AAA contends that the violations of the Exchange Act must be arbitrated before the ICC.

Under Rule 42(3) of this Court, the AAA is required to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be presented by the parties . . ." The AAA makes no pretense of complying with that requirement. Its motion and proposed *amicus* brief reiterate the contentions of the Petitioner, Scherk, in this Court and in the Courts below.

Rule 42(3) requires AAA to "state the nature of the applicant's interest". The AAA disclaims self-interest by pointing out that "the controversy is to be administered not by the AAA but rather by . . . the . . . ICC". (AAA Br. p. 6) The AAA does not mention that it is linked in reciprocal agreements with the ICC and other similar private organizations. (See "Joint Clause ICC-AAA", Rules of Conciliation and Arbitration of the International Chamber of Commerce (1955) p. 4) While

the AAA professes disinterest, we respectfully suggest that it does have interest in limiting the areas in which the Federal courts have "exclusive jurisdiction".

The AAA recognizes that under the express language of the Convention certain controversies are within the "exclusive jurisdiction" of the Courts and are *not* arbitrable. Its brief states:

> "Were there a statute, for instance, which in so many words prohibited the submission to arbitration of a particular question or subject, the Convention would manifestly *not* be applicable."
> (AAA Br. p. 11; emphasis added)

The AAA brief, however, then goes on to state that "in the present case" there is "no such statute" and that the Exchange Act is only "peripherally involved". (AAA Br. p. 11) The Exchange Act violations committed within the United States are the very core of the issue which is involved in this proceeding. Thus, the AAA's entire position is founded on an incorrect assumption and is in fundamental error.

The *amicus* brief does not address itself to Section 27 of the Exchange Act which confers "exclusive jurisdiction" on the Federal District Court for violations of said Act:

> "The district courts of the United States . . . shall have *exclusive jurisdiction* of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." (emphasis added)

Nor does the AAA even mention Section 29(a) of the Exchange Act which renders "void" and unenforceable "*any*" agreement by "*any* person" which purports to evade such mandate of exclusive jurisdiction.

The decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), addressed itself to this precise subject and held that any provision in an agreement which attempts to require arbitration of future disputes is not enforceable as to disputes arising under the securities laws because such disputes are within the exclusive jurisdiction of the courts.

The AAA really contends that the underlying policy of the Convention requires that the Convention be construed as overriding the unambigous provisions of the Exchange Act as well as *Wilko* v. *Swan* and the many decisions since which have applied its doctrine to litigants of all types. Contrary to the assertion of the AAA, the language of the Convention itself confirms and recognizes that an agreement to arbitrate will not be enforced if it is contrary to a statute or public policy.[1]

And in a recent article analyzing the Convention, Mr. Aksen, the General Counsel of the AAA, whose name ap-

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[1] The Convention expressly provides a variety of circumstances which will cause agreements to arbitrate to be unenforceable:

> Where the arbitration concerns "a subject matter [not] capable of settlement by arbitration". [Article II, para. 1; Article V, para. 2(a)]
>
> Where the "agreement is null and void, inoperative or incapable of being performed". [Article II, para. 3]
>
> Where it is "contrary to the public policy of that country." [Article V, para. 2(b)]
>
> Where "the said agreement is not valid under the law to which the parties have subjected it". [Article V, para. 1(a)]

The plain and unambiguous meaning of the foregoing, and in particular the reference to "void" which is the same term used in Section 29(a) of the Exchange Act, is that these provisions recognize, adopt and give effect to the Exchange Act and to the pronouncements in *Wilko* v. *Swan*.

pears as author of the *amicus* brief, acknowledged that the Convention does not "require" arbitration of violations of the securities laws, contrary to the position taken in Point I of the *amicus* brief:[2]

> ". . . questions concerning the legality of the Securities Act (footnote to *Wilko* v. *Swan*) and validity of patents and questions of anti-trust violations have been held to be non-arbitrable because they are against public policy. *The language in the Convention would seem to indicate that American courts have the discretion to refuse enforcement to foreign awards dealing with these subjects.* Whether these limitations will be carried over to arbitration agreements and awards rendered under the Convention is a prime matter for future judicial concern. (3 SW.U.L. Rev. at p. 13; emphasis added)
>
> • • •
>
> . . . since arbitrability is left to the host country court, and *since award enforcement may be refused on the broad grounds of public policy,* it is entirely possible that each country will apply its own standards of local law rather than international ones." (3 SW.U.L. Rev. at p. 20; emphasis added)

The AAA brief asserts that the affirmance of the decision below "would impair the ability of American businessmen to freely negotiate and bargain" or preclude them from resolution of commercial disputes by arbitration. We respectfully suggest that the affirmation of the explicit and special exclusion mandated by Sections 27 and 29(a) of the Exchange Act will no more inhibit international commerce or the use of arbitration than did the adoption of the Exchange Act and the rendition of the de-

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[2] Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 3 SW.U.L. Rev. 1, 13, 20 (1971).

cision in *Wilko* v. *Swan* and the many cases which have applied the Exchange Act to a very broad spectrum of situations. Arbitration has burgeoned and flourished in such atmosphere, as the AAA brief clearly implies.

For the foregoing reasons, Respondent, Alberto-Culver Company, respectfully requests that the motion of the AAA for leave to file an *amicus curiae* brief be denied.

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No. 73-781

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

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No. 73-781

FRITZ SCHERK,

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief for Respondent

STATUTES INVOLVED

In addition to the statutory provisions cited in the Brief for Petitioner, section 10(b) and section 27 of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78aa, are involved herein.

QUESTION PRESENTED

Whether an American investor, defrauded in the United States by a foreign national in violation of section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder, is entitled to an adjudication of its section 10(b) claim in the United States district court

rather than in a foreign arbitration tribunal designated in a general arbitration clause in a contract executed before the violation of the Securities Exchange Act was discovered and before the dispute arose.

STATEMENT OF THE CASE

In submitting a counter-statement of the facts of this case, Respondent proceeds upon the premise that in the present posture of this case, arising solely on the pleadings, affidavits and exhibits of record, the Court should assume the correctness of the allegations of the Complaint and the supporting Affidavits submitted by Respondent. See, *e.g., Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 284 (1952).

The Respondent, Alberto-Culver Company ("Alberto"), is a Delaware corporation with its principal place of business in Melrose Park, Illinois, and is engaged in manufacturing and mass marketing of toiletries and other products. The Defendant and Petitioner, Fritz Scherk ("Scherk"), is a German citizen residing in Geneva, Switzerland.

In extensive negotiations between the parties, Scherk, Scherk's European representative and Scherk's New York attorney came to Melrose Park, Illinois where Scherk and his authorized agents knowingly and fraudulently misrepresented essential facts and purposefully deceived Alberto. (A. 3-10.) Relying on the representations of Scherk and his agents, Alberto purchased from Scherk: (1) all of the outstanding stock of Scherk Enterprises V. Aktiengesellschaft ("SEV"), a Liechtenstein stock corporation which licensed trademarks purportedly owned by it, primarily in Western Europe; (2) Scherk's sole proprietorship located in Berlin, Germany which manufactured and sold cosmetic products primarily in West Germany and

which was called Firma Ludwig Scherk ("FLS"); and (3) Scherk's interest in Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH ("Lodeva"), a German limited liability corporation. The SEV stock and the underlying trademarks were the core of the entire transaction. (A. 4-27, 48-53)

Exploratory negotiations between Alberto and Scherk for the sale by Scherk of all or part of the Scherk businesses occurred in 1967 and early 1968. In December 1967 Leonard Lavin, Alberto's president, met in Melrose Park, Illinois, with Benjamin Navon, Scherk's brother-in-law and Berlin plant manager, and discussed with him the nature and background of Scherk's businesses. Navon pointed out to Lavin that, although the "German business" (FLS) had experienced serious financial difficulties in recent years, the "Scherk International Business" (SEV) had earned substantial profits through royalty income derived from its trademark-licensing arrangements. Navon emphasized the importance of the SEV trademark portfolio and the significant amount of trademark royalty income generated. (A. 4, 11, 30, 49-50)

On April 30, 1968, Scherk sent a letter to Lavin offering to come to Melrose Park and conclude an agreement for the sale of virtually all of the Scherk-owned businesses, including SEV:

> "In order to avoid any further misunderstandings and, above all, further delays, I would suggest that my brother-in-law, Mr. Navon should come over to Chicago with our lawyer Mr. Stuart Marks, of Kaye, Scholer, Fierman, Hayes & Handler, 425 Park Avenue, New York. This way a preliminary *agreement on the principles of the deal can be concluded,* leaving legal and other details to the experts.
>
> Although Mr. Navon has my power of attorney to sign and conclude any agreement I could, if you so

wish, come over on shortest notice for signature." (emphasis added) (A. 4, 50, 51, 55-56)

As a result, Scherk and Navon, and Scherk's New York lawyer, Stuart Marks, came to Melrose Park, Illinois, for discussions held at the end of May and in early June, 1968. Scherk's meetings with Lavin and other Alberto representatives extended over a three-day period. (A. 30-31, 50.)

During these meetings in Melrose Park, in justification of his statements that his businesses were worth substantially more than Alberto had been willing to offer, Scherk repeatedly referred to the valuable trademark portfolio owned by the "International Business" (SEV), the great drawing power of the trademarks owned by SEV, and the substantial trademark royalty profits generated by SEV. Scherk emphasized the value of the trademark portfolio to Alberto both for use in connection with Scherk products and as a means of gaining access for Alberto's own products to Germany and other countries. At no time did Scherk or Navon disclose to Alberto that the Scherk businesses lacked good title to the very trademarks under discussion, which were the essence of the securities to be purchased by Alberto. (A. 50-52)

As contemplated by Scherk, agreement on the basic terms of the acquisition, including the price to be paid, was reached in the May-June 1968 meetings in Melrose Park, Illinois. This fact is evidenced by Scherk's own subsequent letter to Lavin dated June 9, 1969, prior to closing, in which Scherk stated:

> "It is more than a year that we last met at *Melrose Park to agree upon a transaction* which will now, at long last, come to its closing.
>
> • • •

> . . . and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close *the deal which I was glad to have agreed to at your office, one year ago.*" (emphasis added) (A. 56, 57)

In November 1968, Stuart Marks, Scherk's New York lawyer, sent to one of Alberto's attorneys in Chicago a telegram and a letter concerning the trademarks. (A. 5-6, 39, 41-44)

The telegram from Marks, dated November 15, 1968, stated the following with respect to trademarks owned by SEV:

> ". . . SEV . . . will have good and merchantable title to all such registrations and to the best of their knowledge information and belief all such marks [are] free and clear of any charges or claims [with] no actions . . . pending . . . [or] . . . threatened with respect to said titles to any such marks . . . ." (A. 5-6, 39, 42)

The letter from Marks dated November 26, 1968, stated:

> ". . . [W]e would of course be willing to add what I mentioned this evening, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark rights of Scherk." (A. 6, 42-43)

On December 8, 1968, Marks came to a meeting in Chicago for the express purpose of discussing the trademarks. During the meeting, Alberto attorneys addressed to Marks a large number of questions concerning the Scherk trademark portfolio. Marks stated that he had just returned from Germany where he had investigated the status of the trademark portfolio. Marks was asked whether there were any restrictive agreements, opposition proceedings, litigation or other legal proceedings,

past, pending or threatened, with respect to the trademarks other than those previously disclosed. Marks replied that he had checked into the matter in Germany and had determined that there were none. (A. 6, 7-8, 39-40, 45-47)

As Scherk was well aware throughout the negotiations, Alberto was interested not only in marketing the products of Scherk but also in introducing its own products into the European market and that Alberto's ability so to market was dependent upon the integrity and validity of the trademarks being acquired. The District Court noted:

> ". . . Alberto's primary interest in acquiring the trademarks is well documented . . . before the Court. . . . The value and validity of the trademarks, particularly in this transaction, determined the value of the securities to Alberto." (A. 23 to Petition for Certiorari)

In reliance upon the trademark representations of Scherk and his agents, the purchase agreements (the "Agreements") and the long-term promissory notes delivered to Scherk as part of the purchase price were executed by Alberto in Melrose Park in February 1969. The Agreements contained a provision that any disputes which might arise out of the Agreements were to be arbitrated before the International Chamber of Commerce (the "ICC") in Paris, France. The Agreements also specifically provided that the "laws of the State of Illinois, U.S.A. shall apply to and govern the [Agreements, their] interpretation and performance." Each promissory note contained the provision that "[t]his note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes." (A. 5-8, 40, 51-52, 62-68)

As provided in the Agreements between Alberto and Scherk, SEV was transformed by Scherk from one form

of corporation (an "Anstalt") into another form of corporation (an "Aktiengesellschaft") and Alberto purchased the stock of the transformed corporation. By far the greatest portion of the total purchase price paid by Alberto to Scherk was for the capital stock of SEV, the international trademark licensing company. The formal closings under the Agreements occurred in June 1969 in Geneva, Switzerland. (A. 17, 31, 60)

After the acquisition, Alberto discovered that the character, nature and value of the trademark rights as represented and warranted by Scherk[1] differed so materially from their actual character, nature and value as to constitute a failure of consideration. Alberto also learned that these differences were *known to Scherk* during his negotiations with Alberto and that Scherk had deliberately concealed and misrepresented the facts. Known to Scherk and undisclosed to Alberto were (1) numerous agreements granting to others superior rights affecting the marks, (2) agreements restricting or prohibiting Scherk's right to use certain marks, (3) that certain marks were exposed to cancellation because of the failure to use the marks within periods prescribed by statutes, although Scherk had expressly represented to the contrary, (4) that Scherk had previously acknowledged in legal proceedings that others had superior rights to certain marks, (5) that at the time of the negotiations and sale Scherk was a party to numerous legal proceedings in which others were maintaining that they had superior rights to use certain marks, (6) that in one of these proceedings a principal competitor of Alberto was raising a substantial contention that *all* of SEV's international trademark registrations were void. (A. 21-27)

As a consequence, Alberto rescinded the Agreements, tendered to Scherk the stock of SEV and the other prop-

[1] There were 14 pages of express and detailed trademark warranties in the SEV Agreement. (Record Document No. 2)

erties purchased, and, upon his refusal to make Alberto whole, brought the present action again Scherk to enforce rescission under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5. Scherk appeared and moved the District Court to dismiss the Complaint for lack of jurisdiction and for failure to state a claim and, in the alternative, to stay the proceedings pending arbitration. The District Court, in a carefully reasoned opinion (A. 18-33 to Petition for Certiorari), denied those Motions. However, while Scherk's Motions were still under advisement and five months after the lawsuit was instituted, Scherk filed arbitration proceedings against Alberto in Paris, France. The District Court enjoined Scherk from prosecuting the arbitration proceedings after being advised by Scherk's counsel that, unless enjoined, Scherk would continue to prosecute those proceedings. (A. 82-83, 96-100.) The Court of Appeals for the Seventh Circuit affirmed the orders of the District Court, Judge Stevens dissenting. *Alberto-Culver Company* v. *Scherk*, 484 F.2d 611 (7th Cir. 1973)

Before turning to argument of the legal issues, we emphasize that on this appeal, the following determinations of the lower courts are unchallenged by Scherk and must therefore be assumed to be correct:

(1) "The Complaint states a cause of action under Section 10(b) and Rule 10b-5" (A. 24 to Petition for Certiorari);

(2) The "crucial negotiations which led to the consummation of the transaction were held in Melrose Park, Illinois in May-June, 1968" (A. 24 to Petition for Certiorari);

(3) The allegations of the Complaint "would indicate that a serious violation of Rule 10b-5 had occurred within the Northern District of Illinois" (A. 25 to Petition for Certiorari);

(4) "The substance of the allegedly fraudulent activity occurred within the United States" (A. 26 to Petition for Certiorari).

SUMMARY OF ARGUMENT

The issue presented in this case is whether Alberto's claim against a foreign national, Fritz Scherk, for fraudulent acts committed within the United States in violation of section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act")[2] and rule 10b-5 should be adjudicated before the United States District Court or arbitrated before a foreign arbitral tribunal.

It is undenied, and indeed undeniable, that acts committed by Scherk in this country in violation of the Exchange Act have subjected him to the jurisdiction of the District Court, both as to his person and as to the subject matter of the dispute. Further, it is uncontested that the Complaint states a claim under section 10(b) and rule 10b-5. The only remaining issue, therefore, is whether Scherk can avoid the provisions of the Exchange Act, as interpreted by this Court and other courts, declaring void and making unenforceable any agreement purporting to waive rights under that Act, including any waiver of the exclusivity of jurisdiction conferred on the federal district courts by that Act. Because the Exchange Act applies to Scherk and the claims alleged in the Complaint, it necessarily follows that all pertinent provisions of the Act apply, including sections 27 and 29(a).

Section 27 confers "exclusive jurisdiction" on the federal district courts for enforcement of rights arising under the Exchange Act. Section 29(a) renders "void" and unenforceable "*any*" "stipulation" or "provision"

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[2] 15 U.S.C. § 78j(b). Hereinafter citations to the Exchange Act will be sections in the Act itself rather than to sections in the United States Code.

by "*any* person" purporting to "waive" the mandate of exclusive jurisdiction or any other provision of the Exchange Act.

Directly in point is *Wilko* v. *Swan*, 346 U.S. 427 (1953), which held that a general agreement to arbitrate future disputes was "*void*" and unenforceable under section 14 of the Securities Act of 1933 (the "1933 Act"),[3] which contains language substantively identical to that found in section 29(a) of the Exchange Act. The *Wilko* doctrine has regularly been applied to claims arising under the Exchange Act.

The *Wilko* decision is based not only on the mandate of Congress but also on the sound policy consideration that "any person" who has been subjected to securities violations should have access to the courts to enforce his rights. As the Court recognized in *Wilko*, the securities laws are of such importance that they "require the exercise of judicial direction to fairly assure their effectiveness. . . ." (346 U.S. 427, 437)

The securities laws are a vital part of our commercial structure and extend essential and unique protection to a multitude of investors against securities fraud, whether committed by Americans or foreigners. The necessity of protecting against securities fraud committed in this country through effective and proper enforcement of these laws far outweighs any correlative considerations as to the general desirability of promoting international arbitration. The right of an Exchange Act claimant to seek adjudication in a United States district court is an essential aspect of the protections afforded to investors by the securities laws.

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[3] 15 U.S.C. § 77n. Hereinafter citations to the 1933 Act will be to sections on the Act itself than to the United States Code.

Petitioner's contention that the provisions of the Exchange Act and the holding in *Wilko* are overruled by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"),[4] adopted by this country in 1970, is contrary to the provisions of the Convention itself, which explicitly recognize that an agreement to arbitrate shall not be enforced if it contravenes a statute or public policy. Such exceptions to arbitrability are acknowledged throughout the world.

Petitioner further contends that sections 27 and 29(a) of the Exchange Act and the *Wilko* decision should not apply to securities fraud committed by a foreign national. Nothing in the statutes or decisions justifies such a contention. Numerous decisions have held that section 10(b) of the Exchange Act applies to securities fraud committed by a foreign national, where, as in this case, the wrongful acts, in whole or in substantial part, occur in the United States, thereby conferring jurisdiction on the United States courts. Petitioner has not offered any reasoned basis for giving effect to only some, but not all, of the pertinent provisions of the Exchange Act. Indeed, the parties here, both represented by American counsel, specifically agreed that American law would govern their relationship, thereby subjecting themselves to the structure of the American securities laws, including the jurisdictional and "anti-waiver" provisions thereof.

The decision in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), holding enforceable a choice-of-forum provision agreed to between an American and a foreign national does *not* support Petitioner. The *Zapata* decision did *not* involve any statute at all, let alone a very important statute declaring that all rights thereunder are

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[4] [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. The Convention is implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201, *et seq.*

to be "exclusively determined" by the federal courts and then further declaring "any" waiver to be "void". The Court, in *Zapata,* addressed the very question presented here and stated that a ". . . choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy . . . whether declared by statute or judicial decision." (407 U.S. 1, 15)

Petitioner also contends that the Exchange Act and the *Wilko* decision should not apply to "sophisticated businessmen" and should be limited to situations of "disparity in bargaining power". The limitation which Petitioner argues for is not supported by the language of the Exchange Act or by the *Wilko* decision. Even seemingly "sophisticated businessmen" are vulnerable to securities fraud, and are entitled to the same protection that the securities laws afford to any individual.

What is involved here is an attempt by a foreign businessman to evade the clear mandate of a very important federal statutory structure, erected to give relief for deliberate misrepresentation in the purchase and sale of securities.[5]

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[5] A major premise which Petitioner insinuates throughout his brief is that Alberto has "cloaked a traditional claim for alleged breach of warranties with rule 10b-5" and that parties can avoid arbitration and forum selection by "merely pleading the presence of a securities claim." (Pet.Br., p. 19) These insinuations and charges have no place before this Court and ignore the fact that the district courts have ample powers to dismiss and deal with a party who speciously alleges violations of the securities laws. In this case, after carefully weighing the pleadings and affidavits of the parties, the District Court and Court of Appeals both rejected the factual contentions which Petitioner asserts throughout his brief to this Court. The District Court and Court of Appeals both were sufficiently persuaded of the merits of Alberto's claim that Scherk was denied his request to stay the court proceedings and was enjoined from continuing an arbitration proceeding he had instituted five months after Alberto had filed its action.

ARGUMENT

I.

SINCE THE EXCHANGE ACT APPLIES TO THIS SECURITIES TRANSACTION, THE PROVISIONS OF THAT ACT CONFER EXCLUSIVE JURISDICTION ON THE UNITED STATES COURTS AND RENDER VOID THE GENERAL ARBITRATION CLAUSE INVOLVED IN THIS CASE.

A. To Protect Investors The Exchange Act And Rule 10b-5 Have Been Applied To Securities Transactions Between Americans And Foreign Nationals Where Fraud Has Been Committed Within The United States.

Inherent in Petitioner's argument is a fundamental contradiction. Petitioner acknowledges, as he must, the applicability of section 10(b) of the Exchange Act to this transaction, and indeed Petitioner no longer contests that the Complaint states a cause of action under section 10(b) and rule 10b-5. Petitioner similarly must acknowledge that the Exchange Act has been held to be applicable to foreign nationals for securities fraud committed in the United States. However, although accepting the applicability of section 10(b), Petitioner simultaneously contends that sections 27 and 29(a) of the same Act are not applicable to him. Neither statutory construction nor discernible policy considerations support the contradiction urged by Petitioner that some, but not all, of the provisions of the statute are to be applied. All relevant provisions of the Act should be applied where the foreign

defendant has committed acts which bring him within the coverage of the Exchange Act and the jurisdiction of the American courts. Any other conclusion would not only negate section 29(a) but would also subvert the vital protections afforded by section 10(b), which require judicial direction for effective enforcement of that Act.

Unfortunately, as indicated by recent decisions, the generally beneficial expansion of international commercial activities has at times been accompanied by massive and intricate securities frauds upon American investors and they have sought redress in our courts. The Exchange Act and the decisions enforcing it have been the mainstay in affording the requisite protection. Since the primary purpose of the Exchange Act is to protect the investor, our courts have consistently held that foreign nationals are subject to section 10(b) of the Exchange Act and rule 10b-5 and are accountable in the federal courts for securities act violations committed either in whole or in substantial part within this country to the injury of American investors, and even, in some instances, for fraud committed entirely abroad where an American investor is the victim.[6]

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[6] Travis v. Anthes Imperial Limited, 473 F.2d 515 (8th Cir. 1973); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Investment Properties International, Ltd. v. I.O.S., Ltd., CCH Fed. Sec. L. Rep. ¶ 93,011 (S.D.N.Y. 1971); Roth v. Fund of Funds, 279 F. Supp. 935 (S.D.N.Y. 1968), aff'd, 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969); Securities and Exchange Commission v. Myers, 285 F. Supp. 743 (D. Md. 1968); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); Fontaine v. Securities and Exchange Commission, 259 F. Supp. 880 (D. Puerto Rico 1960); SEC v. Gulf International Finance Corp., 223 F. Supp. 987 S.D. Fla. 1963); Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94 (1969); RESTATEMENT, SECOND, OF FOREIGN RELATIONS LAW OF UNITED STATES § 17 (1965). Scherk asserts that Alberto-

Such application of section 10(b) of the Exchange Act to foreign nationals has been emphasized by the Court of Appeals for the Second Circuit:

> ". . . We cannot perceive any reason why it [Congress] should have wished to limit the protection to securities of American issuers. The New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada." *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1336 (2d Cir. 1972)

> ". . . Similarly, *the anti-fraud provision of §10(b) . . . reaches beyond the territorial limits of the United States and applies when a violation of the Rules is injurious to United States investors." Schoenbaum* v. *Firstbrook,* 405 F.2d 200, 206 (2d Cir. 1968), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1969) (*en banc*), *cert. denied,* 395 U.S. 906 (1969) (emphasis added)

These judicial pronouncements have been noted with approval by law review commentators:

> ". . . Isolated transactions, not part of a regular foreign business in securities, should be subject to the [Securities Exchange] Act *whenever there are sufficient minimal contacts with this nation to justify the exercise of Congressional power.* Whether those contacts exist is primarily a question for the judiciary. . . ." Note, *Extraterritorial Application of the Securities Exchange Act of 1934,* 69 COLUM. L. REV. 94, 111 (1969) (emphasis added)

(Footnote continued)

Culver initiated the first contact with him in Germany. As the Court held in Travis v. Anthes Imperial Limited, *supra,* where the defendant has committed securities fraud within the United States ". . . [I]t is not material who initiated the communications. . . . [C]ommonsense requires the rejection of the argument that a person could freely communicate a misrepresentation . . . if the defrauded party . . . initiated the communication. . . ." (473 F.2d 515, 527)

Any erosion of the right of an American citizen to seek redress under the Exchange Act in the federal courts against foreigners who commit securities frauds within the United States would have detrimental consequences, particularly in these times of expansion of international commerce. Not only would defrauded American citizens lose the effective method of enforcing their rights, but any such erosion would deprive the nation of a significant deterrent against such misconduct. There is no persuasive justification for emasculating the protection afforded to investors under the securities laws by permitting a foreign national who engages in securities fraud within this country to avoid being called to account in the courts of the United States where the statutory purpose and pattern are so well understood and applied.

B. Sections 27 and 29(a) Of The Exchange Act Confer Exclusive Jurisdiction On The United States Courts And Void The General Arbitration Clause Involved In This Case.

Petitioner's brief virtually ignores section 27 of the Exchange Act which confers "exclusive jurisdiction" on the federal district courts for violations of the Act:

> "The district courts of the United States . . . shall have *exclusive jurisdiction* of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." (emphasis added)

Similarly, Petitioner's brief makes no attempt to address section 29(a), the "anti-waiver" provision of the Exchange Act, which renders "void" and unenforceable "*any*" "stipulation" or "provision" by "*any* person" which purports to evade the Congressional mandate conferring exclusive jurisdiction on the United States district courts.

Nor has Petitioner suggested any statutory construction for not applying these provisions to actions against a person who commits securities fraud within this country merely because he happens to be a foreign national or because the victim happens to be a "sophisticated" person. The plain language of section 29(a) of the Exchange Act applies:

1. To "*any* condition, stipulation or provision . . ."
2. ". . . binding *any* person . . ."
3. "to waive compliance with *any* provision of [the Exchange Act]. . . ."

Alberto's alleged waiver of its right to bring a claim in the federal district court is indisputably a "condition, stipulation or provision". The alleged waiver purports to bind Alberto, a company which is indisputably a "person" within the meaning of the Exchange Act. And section 27 of the Exchange Act providing that the district courts of the United States shall have exclusive jurisdiction for suits brought to enforce any liability created by the Exchange Act is indisputably a "provision" of the Exchange Act.

The decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), addressed the precise question here presented and held that section 14 of the 1933 Act voids a general agreement to arbitrate future disputes arising under that Act.[7]

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[7] The Wilko doctrine, formulated in a case involving the Securities Act of 1933, applies *a fortiori* to matters arising under the Exchange Act which contains an "anti-waiver" provision virtually identical to that found in the 1933 Act. The statutory language of the Exchange Act is even more persuasive than the language of the 1933 Act since section 27 of the Exchange Act confers "exclusive jurisdiction" on the federal courts whereas the 1933 Act makes no reference to exclusivity.

The *Wilko* doctrine, declaring certain disputes involving important statutory or public policy rights to be non-arbitrable, has been upheld, not only in securities controversies, but also in disputes arising under anti-trust and patent laws.[8] And as recently as February, 1974, in an action arising under the Civil Rights Act of 1964 (42 U.S.C. §2000(e) *et seq*), this Court proclaimed the "policy against discrimination to be of the 'highest priority'" and held that the right to court adjudication under that statute could not be waived. *Alexander* v. *Gardner-Denver Company*, 94 S.Ct. 1011, 1019 (1974). In that case, *Wilko* was expressly cited with approval and the *Wilko* doctrine was upheld despite the absence of any provision in the Civil Rights Act comparable to the "anti-waiver" provision found in section 29(a) of the Exchange Act.

The Court in *Wilko* took cognizance that the *effectiveness* of our securities laws and the protection to investors afforded thereunder were of the highest importance. The Court decided that ". . . the protective provisions of the Securities Act require the exercise of judicial direction to

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[8] Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55, 62-63 (7th Cir. 1970) (agreement to arbitrate patent claims held invalid); American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (agreement to arbitrate anti-trust claims held invalid). *See also*, Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); and A. & E. Plastik Pak Co. v. Monsanto Company, 396 F.2d 710, 715-716 (9th Cir. 1968) (both anti-trust). The following cases have applied the Wilko doctrine in disputes arising under the securities laws: Greater Continental Corp. v. Schecter, 422 F.2d 1100 (2d Cir. 1970); Shapiro v. Jaslow, 320 F.Supp. 598 (S.D.N.Y. 1970); Maheu v. Reynolds & Co., 282 F.Supp. 423 (S.D.N.Y. 1967); Pawgan v. Silverstein, 265 F.Supp. 898 (S.D.N.Y. 1967); Stockwell v. Reynolds & Co., 252 F.Supp. 215 (S.D.N.Y. 1965). *See also* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) (seaman's wage claim); and cases cited at footnote 15 of this brief.

fairly assure their effectiveness. . . ." (346 U.S. 427, 437) The Court also concluded that the proper enforcement and effectiveness of the securities laws ". . . is lessened in arbitration as compared to judicial proceedings." (346 U.S. 427, 435) The Court observed that arbitrators often proceed:

> ". . . without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of . . . statutory requirements . . . cannot be examined . . . and the interpretations of the law by the arbitrators . . . are not subject . . . to judicial review for error in interpretation." 346 U.S. 427, 436

That successful prosecution of a section 10(b) claim almost always requires extensive pre-trial discovery is also self-evident. Yet arbitration does not provide for discovery. Similarly, the wide choice of venue granted by the Exchange Act would be defeated if prior agreements to arbitrate Exchange Act violations were enforced.[9] The infirmities of arbitration were again emphasized in *Alexander* where the Court stated:

> "Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and

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[9] By reason of the infirmities of arbitration, including lack of discovery, lack of effective review, lack of legal expertise of arbitrators, and inadequate protection of the public interest in the development of a known body of law, law review commentators have concluded that compulsory arbitration is inappropriate in the anti-trust field. Pitofsky, *Arbitration and Antitrust Enforcement*, 25 ARB. J. 40, 40-49 (1970) The same considerations are applicable to controversies arising under the securities laws.

> rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 . . . (1956); *Wilko* v. *Swan*, 346 U.S. 427, 435-437 . . . (1953). And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, at 598 . . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." 94 S.Ct. 1011, 1024

The difficulties of assuring a proper hearing of a section 10(b) claim are enormously compounded if this matter is heard by a foreign arbitral tribunal where it is a practical certainty that there will be unfamiliarity with the unique principles of the Exchange Act.

Accordingly, Alberto urges that this Court base its decision on the:

1. well-reasoned judicial authorities which have applied the Exchange Act to foreign nationals where jurisdictional requirements are satisfied;

2. importance of protecting the rights of American investors under the Exchange Act by requiring foreign nationals who commit securities fraud within the United States to be accountable in the federal courts;

3. unambiguous language of the Exchange Act conferring "exclusive jurisdiction" on the federal courts and declaring any attempted waiver to be "void"; and

4. judicial authorities, including both a long-standing as well as a very recent decision of this Court,

which have involved securities, anti-trust, patent and racial discrimination laws, holding a general arbitration clause to be unenforceable where it contravenes a statutory or public policy.

Any one of the foregoing bases, standing alone, justifies a decision upholding Alberto's right to have this securities fraud, committed in the United States, adjudicated in the United States District Court.

II.

NEITHER THE CONVENTION NOR THE FEDERAL ARBITRATION ACT OVERRULES THE PROVISIONS OF THE EXCHANGE ACT OR THE WILKO DOCTRINE.

Petitioner asserts that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act override the provisions of sections 27 and 29(a) of the Exchange Act.[10]

Petitioner's contentions, however, are contradicted by the language and legislative history of the Convention itself. The Convention, in five different paragraphs, ex-

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[10] The agreement in the present case was signed and closed in 1969. The Convention was not ratified until 1970. Hence, the parties here could scarcely have contracted with respect to the Convention. There is no indication in the text of the Convention itself and absolutely *no* evidence that Congress in 1970 intended to make its own ratification retroactive. Under United States law, treaties do not have retroactive effect upon private parties whose relations were established before the treaty came into force. Board of County Commissioners of Dade County, Florida v. Aerolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962), cert. denied, 371 U.S. 961 (1963). *See also,* Haver v. Yaker, 76 U.S. (9 Wall.) 82 (1869). Thus, even if the Convention by its terms compelled arbitration of securities law violations, which it does not, it could not retroactively affect this case.

plicitly adopts the *Wilko* rationale. The Convention preserves the right to court adjudication:

> where the arbitration concerns "a subject matter [not] capable of settlement by arbitration." (Article II, para. 1; Article V, para. 2(a));
>
> where the "agreement is null and void, inoperative or incapable of being performed." (Article II, para. 3);
>
> where the arbitration is "contrary to the public policy of that country." (Article V, para. 2(b)); and
>
> where "the said agreement is not valid under the law to which the parties have subjected it." (Article V, para. 1(a)).

As the American Arbitration Association (the "AAA") observes in its *amicus* brief, (AAA Am. Br., p. 11) the legislative history confirms that Congress understood that the draftsmen of the Convention had deliberately provided for these exceptions to arbitrability ". . . in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration". (S. Exec. Doc. E, 90th Cong., 2d Sess. 19 (1968)) The decision of the United States to ratify the Convention was subject to the express qualifications found in the language of the Convention. The necessity for preserving the right to court adjudication of certain matters has been long recognized in this and other countries throughout the world.[11]

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[11] For example, French public policy precludes arbitration of questions relating to the sale or mortgaging of goodwill (*fonds de commerce*), bankruptcy, ownership and validity of patents and trademarks, the validity of corporations, and matters affecting the rights of third parties. In Germany, there is no arbitration of "cartel agreements" or "matters pertaining to public law or involving public policy . . . such as divorce, legal incapacity, matters relating to legal status, bankruptcy, and criminal matters." Evans and Ellis, *International Commercial Arbitration: a Comparison of Legal Regimes*, 8 TEX. INT. L.J. 17, 34, 41-42 (1973)

In asserting the Convention as overriding the language of the Exchange Act, Petitioner is, in effect, making an argument far less persuasive than the one rejected by the Court in *Wilko*. Chapter One of the Federal Arbitration Act (9 U.S.C. §101 *et seq.*), which the Court declined to apply in *Wilko*, contained *none* of the broad exceptions to arbitration found in the Convention.[12]

Petitioner's reliance on the Convention also disregards the fact that these parties, both advised by American counsel, specifically agreed that the "laws of the State of Illinois, U.S.A. should apply to and govern this agreement, its interpretation and performance."[13] It follows that the parties must be held to have accepted the applicability of the Exchange Act to their transaction, including sections 27 and 29(a). It further follows, under Article V, paragraph 1(a) of the Convention, that any award entered by an arbitral tribunal would be unenforceable since it would not be "valid under the law to which the parties have subjected it."

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[12] Petitioner's assertions that the Convention "supersedes Wilko" (Pet. Br., p. 7) and that "THE FEDERAL ARBITRATION ACT REQUIRES THAT THE DISPUTE BE ARBITRATED . . ." (Pet. Br., p. 9) grossly distort the clear meaning of the Convention. Moreover, repeals by implication are not favored, United States v. Philadelphia Nat'l Bank, 373 U.S. 321, 350 (1963); and United States v. Borden & Co., 308 U.S. 188, 198-199 (1934), and in the absence of an express repeal of sections 27 and 29(a) of the Exchange Act, it must be assumed that Congress intended that the Convention operate harmoniously with the Exchange Act.

[13] The AAA correctly states that the Illinois law provision "under the supremacy clause . . . becomes the federal law." (AAA Am. Br., p. 13) *See also*, RESTATEMENT, SECOND, CONFLICT OF LAWS §4(1) and comment 4b to §4(1) (1971); Boyer v. Atchison, T. & S. F. Ry. Co., 38 Ill.2d 31, 230 N.E. 2d 173 (1967).

III.

A FAIR ANALYSIS OF WILKO CONFIRMS THAT IT IS NOT LIMITED TO SITUATIONS INVOLVING INEQUALITY OF BARGAINING POWER NOR IS THERE ANY SUCH LIMITATION IN THE LANGUAGE OF SECTION 29(a) WHICH APPLIES EXPRESSLY TO "ANY PERSON".

Petitioner contends that *Wilko* should be limited to situations involving "disparity of bargaining power" and "form contracts", (Pet. Br., p. 13) That contention ignores the express statutory language of Section 29(a) which voids any waiver by ". . . *any* person . . . ."

That the Court in *Wilko* did not intend to so limit its decision is evident from statements found in the majority and dissenting opinions.[14] The Court's framing of the issue and its decision confirm that it intended to proclaim a broad holding, founded on the "anti-waiver" provision in the 1933 Act:

> "The question is whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision' of the Securities Act which Section 14 declares 'void'." 346 U.S. 427, 430

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[14] The majority opinion states that buyers of securities are covered by the securities laws even though ". . . a buyer and seller of securities, under some circumstances may deal at arm's length on equal terms. . . ." (346 U.S. 427, 435) Mr. Justice Frankfurter, in his dissent, observed that the Wilko decision did *not* turn on "overreaching as between parties bargaining not at arm's length", and the dissent further states that the majority opinion pronounces, "the anti-waiver provision of the Securities Act a general limitation on the Federal Arbitration Act." (346 U.S. 427, 440)

The Court decided:

> ". . . Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." 346 U.S. 427, 438

Subsequent judicial decisions have applied the *Wilko* doctrine to transactions involving knowledgeable businessmen in highly complicated transactions.[15]

As this Court stated in *Wilko*, the purchaser of securities operates at an inherent disadvantage. Regardless of the extent of his investigations, he can seldom, if ever, attain the degree of knowledge concerning his potential investment which is possessed by the seller. This most certainly follows where the seller is engaged in a scheme to defraud through misrepresentation and concealment. Even those who are experienced or seemingly experienced

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[15] Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39 (10th Cir. 1973); Pawgan v. Silverstein, 265 F.Supp. 898 (S.D. N.Y. 1967); Premier Industries, Inc. v. Delaware Valley Financial Corporation, 185 F.Supp. 694, 695 n.1 (E.D. Pa. 1960). *See also*, Greater Continental Corp. v. Schecter, 422 F.2d 1100 (2d Cir. 1970). Petitioner has cited Alco Standard Corp. v. Benalal, 345 F. Supp. 14, 24 (E.D. Pa. 1972) and GCA Corp. v. Coler, 1971-1972 CCH Fed. Sec. L. Rep. ¶ 93,339, p. 91,815 (S.D.N.Y. 1972). In neither of these two district court cases was the subject adjudicated, and any observations that the subject was open to debate were at most plainly *dicta*. The other cases cited by Petitioner involve either *post*-dispute arbitration agreements or agreements which are subject to arbitration under the rules of stock exchanges and which under section 28(b) of the Exchange Act are exempted from the anti-waiver provisions of section 29(a) of the Exchange Act. Those situations are not involved here.

are entitled to be protected against securities fraud to the full extent provided in the securities laws, and *Wilko* so recognizes.[16]

The infeasibility of limiting *Wilko* to cases of "disparity of bargaining power" or to the uninformed, as urged by Petitioner, is manifest. Such a limitation would foster uncertainty over whether particular controversies are to be resolved by judicial process or arbitration. In each case the district court would be required to inquire into the relative sophistication of the parties, the disparities in their bargaining power, the manner in which the negotiations were conducted, the effect of the fraud in altering the apparent relationship of the parties, and possibly even the competency and expertise of counsel and other experts retained by the parties. Substantial discovery would clearly be necessary, and in many cases the

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[16] Petitioner also asserts that Wilko involved a "garden variety" securities transaction, while this case does not. (Pet.Br., p. 15) This Court has already approved the view that section 10(b) of the Exchange Act applies broadly and is not limited to "garden variety" frauds. Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971). Petitioner also argues that Wilko should not apply to the Exchange Act, even though section 29(a) of that Act is virtually identical to section 14 of the 1933 Act which was involved in Wilko. The purported reason for this distinction, never before suggested by Petitioner in the lower courts, is that the 1933 Act contains an express private remedy, whereas the section 10(b) remedy of the Exchange Act has been implied by the courts. Petitioner's contention is without merit for it necessarily assumes that Congress intended to foreclose a private right of action for violations of section 10(b). The judicial determination that a private right of action exists under the Exchange Act is obviously founded upon the statute and is now so well established as to be beyond question. Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971); *see, e.g.,* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

district court would actually be deeply enmeshed in the merits of the section 10(b) controversy before it could even decide the question of arbitrability.

Petitioner unwittingly focuses this problem in his Brief (p. 14) when he asserts that "Alberto was well informed on all aspects of this relatively major acquisition." That statement goes directly to the *merits* of the controversy. Alberto was *not* "well informed" of the fact that Scherk lacked good title to the trademarks which he represented that he owned. Had Alberto been "well informed" of that fact, it would not have consummated the transaction.

Petitioner's attempt to read into sections 27 and 29(a) of the Exchange Act any limitation that these provisions do not apply to the "sophisticated" is totally alien to the statutory scheme. As stated in *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville,* 409 F.2d 989 (5th Cir. 1969):

> "This policy argument has neither statutory nor case authority, and it also lacks theoretical merit. Neither Congress nor the Securities and Exchange Commission has indicated that the unsophisticated and the unwary are the only wards of Rule 10b-5. Fraud may also be prepetrated upon the powerful and the sophisticated. *Cf., Roquemore* v. *Ford Motor Company,* 5th Cir., 1968, 400 F.2d 255. Therefore, in view of the fact that gullibility is not the province of any one group, the protections and remedies of the Securities Act are not accorded only to those who fail a battery of information and intelligence tests, but are simply conditioned upon the misrepresentation of material facts." 409 F.2d 989, 992

IV.

THE ZAPATA DECISION SUPPORTS THE WILKO DOCTRINE.

Petitioner relies on the decision in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which held that a choice-of-forum provision agreed to between an American and a foreign national was enforceable. That decision in no way supports his position. The *Zapata* decision did not involve any statute, and particularly not an important federal statute with a provision conferring exclusivity of jurisdiction upon the federal courts and an "anti-waiver" provision. Moreover, recognizing the existence of limitations on the contractual right to select a forum, the *Zapata* opinion directly addressed the question here presented, stating:

> ". . . A contractual choice-of-forum clause should be held *unenforceable* if enforcement would contravene a strong public policy of the forum in which suit is brought, *whether declared by statute or by judicial decision.* See *e.g., Boyd* v. *Grand Trunk W.R. Co.*, 338 U.S. 263 . . . (1949)." 407 U.S. 1, 15 (emphasis added)

This reference in the *Zapata* decision to *Boyd* was particularly appropriate, since *Boyd* was also relied upon and cited in *Wilko*. In *Boyd*, this Court considered the validity of an agreement restricting an employee in his choice of venue in an action arising under the Federal Employer's Liability Act. (45 U.S.C. §51 *et seq.*)[17] This Court upheld the employee's right, granted by statute, to

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[17] The agreement limited the place where an injured employee might bring suit to the county or district where he "resided . . . or where . . . injuries were sustained and not elsewhere." (338 U.S. 263, 264) The Act, however, additionally permitted suit in any district where the railroad was doing business.

sue at any place where the railroad was doing business, although that was prohibited by a choice-of-forum provision contained in such written agreement. In so doing, this Court relied on an "anti-waiver" provision in the statute even less absolute than the one found in *Wilko* and in the instant case:

> ". . . We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5 of the Liability Act. 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. . . .' The contract before us is therefore void." 338 U.S. 263, 265

Thus, the line of authority from *Boyd* to *Wilko* to *Zapata* to the very recent decision of this Court in *Alexander* and the interrelationship of those cases are clear. In the ordinary case, choice-of-forum provisions will be upheld, whether the parties select an arbitral tribunal or a court as the forum for resolution of their dispute. But where, by statutory mandate or judicially declared public policy, claims are reserved to the jurisdiction of the courts, such agreements are "void" and will not be enforced.

V.

THIS COURT'S AFFIRMANCE OF THE DECISION OF THE COURT OF APPEALS AND THE WILKO DOCTRINE WILL NOT INHIBIT INTERNATIONAL COMMERCE. SECURITIES FRAUD COMMITTED WITHIN THE UNITED STATES SHOULD BE ADJUDICATED IN THE UNITED STATES COURTS.

Petitioner's entire argument, in the final analysis, seems to be predicated on the wholly *unsupported* assumption that affirming Alberto's right to adjudicate this

securities fraud in the federal courts will inhibit international business and will wilt the American businessman's ability to compete effectively on the international scene.

It has been suggested that an American businessman may be placed at a disadvantage if, in competing abroad, he has to admit that an arbitration clause he might sign "would be void in his own country." (AAA Am. Br., p. 7) The fact is that such exceptions to arbitrability are common throughout the world. (See footnote 11, *supra*.) If, for example, the hypothetical American businessman is competing with a Frenchman, the latter would have to "admit" that in France certain agreements to arbitrate are "void". It is nevertheless evident that international commerce has burgeoned in such environment, and there is no reason whatsoever to believe that affirmance of the decisions of the courts below will adversely affect the competitive position of American businessmen.

Petitioner's contentions also fail to take heed of the fact that Alberto's suit is founded on a securities fraud committed *in the United States*. Affirmance of the decision below should not affect legitimate international commerce, since the vast majority of international transactions do not involve securities fraud committed within this country. But where securities fraud is committed within the boundaries of the United States, it most certainly should follow that the defrauded investor, whether he be an American or a foreign national, is entitled to the complete protection afforded by the Exchange Act, including access to the United States courts.

Such a holding by this Court that securities fraud committed within the United States will be redressed by the courts, should serve as a deterrent to such misconduct and

afford essential rule 10b-5 protection and remedies to those injured by violations of the Exchange Act, and will be so regarded by American and foreign businessmen in international commerce.

Petitioner's unsupported conjecture that international commerce will be inhibited should not override the Congressional mandate in the Exchange Act, the many applicable judicial authorities, and the paramount policy consideration of protecting investors against securities fraud committed in the United States. We know of no justification, theoretical or practical, for permitting the perpetrator of a securities fraud in the United States to circumvent our courts, which Congress specified as the exclusive forum for deciding such controversies.

CONCLUSION

With careful calculation, Petitioner's brief seeks to substitute emotion for reason by presenting Scherk as the prototype of a legitimate foreign businessman who has been done in while doing business with Americans. Scherk is portrayed as an "unsuspecting foreigner", who having "contracted in good faith," "finds himself the victim of an idiosyncracy of American law". (Pet. Br., p. 20) In reality, as the pleadings and affidavits reveal: (1) Scherk was a more than ordinarily sophisticated foreign businessman, thoroughly accustomed to maneuvering multi-nationally in many countries including Germany, his country of citizenship, Switzerland, his country of residence, and Liechtenstein, the tax haven of the very sophisticated; (2) Scherk knowingly committed securities fraud by misrepresenting the underlying trademarks as being valid and free from serious defects and encumbrances; and (3) Scherk, far from being a victim of American law, was fully represented by American counsel qualified in international

transactions, who by explicit provision of the agreements in issue expressly designated that the agreements would be governed by American law.

Whatever may be the advantages of arbitration in other contexts, it is the statutory policy of the United States to preserve the right to adjudicate in its courts claims arising under the securities laws. Where, as in the instant case, a foreign national comes to this country and defrauds an American citizen in violation of section 10(b) of the Securities Exchange Act of 1934, effective redress requires and presupposes the right of access to the federal forum. Any pre-dispute agreement to waive that right is and should be void.

Respondent respectfully requests this Court to affirm the decisions below.

Dated: April 5, 1974

Respectfully submitted,

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APPENDIX

Securities Act of 1933

Section 14

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

Section 10(b)

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27

The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity

and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Section 29(a)

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE TRANSACTIONS AT ISSUE ARE INDISPUTABLY INTERNATIONAL IN CHARACTER.

Respondent Alberto-Culver Company contends that this is no more than a garden variety domestic dispute. Alberto-Culver achieves the aura of domesticity in its Statement Of The Case only by severely truncating the facts and focusing on a few Illinois contacts. There is no reason

why this Court must ignore the *undisputed* facts contained in the affidavits submitted by the Petitioner.

The undisputed facts in the record clearly demonstrate that these transactions are international, not domestic. The businesses acquired were European businesses, manufacturing and selling goods in Europe and licensing trademarks in countries other than the United States. (A. 3-4, 32-33, 48-49.) The negotiations began in Europe, proceeded for two years on both sides of the Atlantic and finally concluded at a closing held in Geneva, Switzerland in June, 1969. (A. 30-31, 86-89.) During the course of the negotiations, numerous meetings took place in Europe, as did a detailed investigation of the businesses. Once the preliminary terms were agreed upon in the spring of 1968, a full year elapsed before the closing. During that time, the parties negotiated and finally agreed upon extensive, written contracts, including 25 pages of detailed trademark warranties.* The acquisition agreements did not become binding upon Mr. Scherk until he signed them in Europe. Thus, Alberto-Culver's characterization of these transactions as essentially domestic is clearly erroneous.

II. THE TRANSACTIONS AT ISSUE ARE STANDARD BUSINESS ACQUISITIONS.

When Alberto-Culver asserts that these transactions are typical securities transactions and that it is just an ordinary investor in need of the protections afforded by the Securities Exchange Act of 1934 (the "Exchange Act"), it is putting form over substance.

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* The trademark warranties in the FLS contract run for eleven pages, and in the SEV contract for fourteen pages. (Exhibits 1 and 3 to Complaint, Record Document No. 2.)

Any fair appraisal of the *substance* of these transactions produces the conclusion that Alberto-Culver wanted to buy, and did buy, operating businesses that manufactured and sold cosmetics. Alberto-Culver was not looking for an investment vehicle. It wanted to conduct business operations in Europe, and the acquisition of the Scherk businesses was to provide the means to that end.

Once the dispute arose between the parties, Alberto-Culver fell back on the form of the transactions, pleading a Rule 10b-5 claim, at least in part, certainly, hoping to escape its obligation to arbitrate. Cutting through the ubiquitous 10b-5 label, the gist of Alberto-Culver's claim is alleged breach of contractual warranties and common law fraud. The Second Circuit has recently expressed concern that the ease with which one can state a Rule 10b-5 claim unfairly allows plaintiffs to "[strip] the defendant of its contractual right to arbitrate." *Kavit* v. *A. L. Stamm*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,365 at 95,235 (2d Cir. 1974).

III. ALBERTO-CULVER'S EXCUSES FOR SEEKING AN ESCAPE FROM ITS AGREEMENT TO ARBITRATE ARE NOT COMPELLING.

Alberto-Culver asserts that *Wilko* v. *Swan*, 346 U.S. 427 (1953), applies to this case and precludes arbitration. The central issue, however, is whether or not *Wilko* should be applied to international transactions such as the ones present in this case. If *Wilko* does not apply in the context of this case, the arbitration provisions are enforceable.

Wilko was a domestic case decided twenty years ago without any consideration given to its effect on, or

the exigencies of, international commerce.* Since that time, there has emerged a strong, national public policy in favor of enforcing international arbitration agreements. *First*: this country acceded to the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (the "UN Convention"), with Congress enacting Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §201 *et seq.*, to implement that accession.** *Second*: the United States signed the U.S.-U.S.S.R. Trade Agreement of 1972, which states that both governments encourage the use of arbitration to settle disputes arising out of international commercial transactions between their citizens. 67 Dept. State Bull. 595, 597 (1972). *Third*: this Court in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), recognized that forum selection clauses are indispensable elements in international commercial transactions. 407 U.S. at 13-14. Arbitration agreements are merely one type of forum selection clause.

The *Wilko* rationale as applied to the Exchange Act rests on Section 29(a) of the Act, 15 U.S.C. §78cc(a), which

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* Respondent cites various cases where *Wilko* has been applied to disputes under the federal securities laws. Br., p. 18 n 8 and p. 25 n 15. None of those cases is determinative of the issue before this Court because none of those cases involved an *international* commercial dispute. They, like *Wilko*, were all decided in a domestic context.

Respondent's reliance on *Alexander* v. *Gardner-Denver Co.*, ___ U.S. ....., 94 S.Ct. 1011 (1974), is also misplaced. That case was concerned with the application of Title VII of the Civil Rights Act of 1964, 47 U.S.C. §2000e *et seq.*, in a case involving a claim of racial discrimination, a pervasive domestic problem. That case has no bearing on international commercial transactions and the policies applicable thereto.

** In so doing, Congress did not exclude transactions involving securities, although that would have been simple to do.

provides that a stipulation or provision waiving compliance with any provision of the Act is void. Alberto-Culver first suggests that it will be deprived of the protection of Section 10(b) and Rule 10b-5. But Mr. Scherk has not asserted that Alberto-Culver will be unable to raise Rule 10b-5 before the arbitrators and seek resolution of that claim. Alberto-Culver next asserts the extraordinary proposition (Br. p. 20) that our securities laws' concepts are so "unique" that the arbitrators could not understand them.* However, the gist of Alberto-Culver's Rule 10b-5 case is:

1. Did Mr. Scherk lie to Alberto-Culver about his trademarks?
2. If so, was the lie about a material fact (*i.e.*, a fact which a reasonable man would or might want to know concerning an investment decision)?
3. If so, was Alberto-Culver deceived by the lie?

That analysis is certainly not beyond the ken of competent arbitrators.

Alberto-Culver suggests that the arbitration provisions result in a waiver of Section 27 of the Exchange Act, 15 U.S.C. §78aa, providing that the United States District Courts have "exclusive jurisdiction" of violations of the Act. The fair interpretation of Section 27 is that, for proceedings brought in a court, the United States District Courts have jurisdiction of Exchange Act violations and the state courts do not. After all, the Securities and Exchange Commission conducts proceedings and disciplines

* The assertion, that our securities laws involve such "unique principles" that foreigners cannot be expected to understand them, if true, should be sufficient grounds for dismissing the action against Mr. Scherk, a foreigner.

broker-dealers and their agents for violations of the Exchange Act.* Disputes between broker-dealers who are members of a stock exchange are arbitrated.** Furthermore, the courts uniformly have concluded that parties can agree to arbitrate *existing* disputes. *E.g., Moran* v. *Paine, Webber, Jackson & Curtis,* 422 Pa. 66, 220 A.2d 624 (1966), and 389 F.2d 242 (3d Cir. 1968); *Reader* v. *Hirsch & Co.,* 197 F. Supp. 111, 117 (S.D.N.Y. 1961) (dictum).

Since *Wilko,* as applied, invalidates only agreements to arbitrate future disputes and not agreements respecting existing disputes, the result must turn on the policy considerations relevant to agreements to arbitrate *in advance* of a dispute. In *Wilko,* the Court faced the situation of brokerage houses using non-negotiated, form contracts requiring customers to waive court suits. The Court also recognized that usually a customer is at a serious disadvantage in dealing with the broker-dealer. The customer

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* *E.g., Coenen* v. *R. W. Pressprich & Co.,* 453 F.2d 1209 (2d Cir. 1972), *cert. denied,* 406 U.S. 949 (1972); *Axelrod & Co.* v. *Kordich, Victor & Neufeld,* 451 F.2d 838 (2d Cir. 1971). This result is based upon interpretation of Section 28(b) of the Exchange Act, 15 U.S.C. §78bb(b).

Based upon an interpretation of 15 U.S.C. §78o-3(b), a customer was able to force a broker-dealer to arbitration against its will because the broker-dealer was a member of the National Association of Securities Dealers, whose rules provide for arbitration. *Financial House, Inc.* v. *Otten,* 369 F.Supp 105 (E.D. Mich. 1973).

** *E.g., Baron & Co., Inc.,* [Current Binder] CCH Fed. Sec. L. Rep. ¶79,609 (Exchange Act Release No. 10480, 1973). The statutory basis for such SEC proceedings is Section 19(a) of the Exchange Act, 15 U.S.C. §78s(a). Such proceedings are not precluded by the "exclusive jurisdiction" language of Section 27. *Wright* v. *Securities and Exchange Commission,* 112 F.2d 89, 95 (2d Cir. 1940).

might well not appreciate what he is giving up. Furthermore, broker-dealers have not refused to engage in their regular business of selling securities because arbitration could not be agreed upon in advance.

However, the exigencies relating to international commercial dealings, particularly of the type involved in this case, are just the opposite. This was an arm's-length, detailed, negotiated business deal between sophisticated businessmen with equal bargaining power, who knew what they were doing. As this Court stated in *Zapata,* the certainty engendered by the obtention of a mutually acceptable, possibly neutral forum for future disputes "is an indispensable element of international trade, commerce, and *contracting.*" (Emphasis added.) 407 U.S. at 13-14. It is this absolute need for certainty in international transactions, without which any specific transaction could be frustrated, that clearly demarcates the instant case from the domestic situation in *Wilko.* In *Wilko,* it did not make sense to preclude arbitration of existing disputes, and it did serve public policy to prohibit agreements to arbitrate future disputes. But in the instant case, it makes no sense to prohibit either agreements to arbitrate existing disputes or future disputes. A rule that Americans engaged in negotiated, international commercial dealings which involve securities cannot agree in advance to arbitration is bound to hinder American international commerce.

None of Alberto-Culver's other reasons for prohibiting arbitration is compelling. First, it asserts that, because other countries make exceptions to their willingness to enforce arbitration agreements, so should the United

States.* That is exactly the type of parochial attitude condemned by this Court in *Zapata*. Admittedly, the UN Convention provides for some exceptions due to public policies of the participating countries. However, exceptions should be just that—exceptions, not the rule. If every country busily excludes major areas from coverage by the UN Convention, the Convention will become illusory and a trap for the unwary.

Alberto-Culver also claims it will be precluded from discovery if it arbitrates. To the extent that is true, Alberto-Culver knew that when it agreed to arbitrate. Moreover, as the Pattishall opinion letter and the Silver affidavit make clear, Alberto-Culver has already investigated its claims and collected the documents which it deems relevant to its claim. (A. 21-27, 40-41.) Since Alberto-Culver has all of the businesses' books and records, it will be at no disadvantage.

Finally, the UN Convention is not being improperly applied in a retroactive manner to Alberto-Culver's contracts. The Convention does not alter the explicit terms of the agreements. It just provides further support for the proposition that those provisions are enforceable.**

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* Based upon the Evans and Ellis law review article, 8 Tex. Int. L. J. 17 (1973), Alberto-Culver asserts (Br. p. 22 n. 11) that in Germany cartel agreements are not arbitrable. But Evans and Ellis specifically state that cartel agreements *involving foreign commerce are arbitrable*, as long as the arbitration clause is authorized by the cartel authorities. 8 Tex. Int. L. J. 17, 41-42 (1973).

** The only basis upon which Alberto-Culver can assert that the UN Convention and Chapter 2 of the Federal Arbitration Act are tampering with its contractual commitments is that when Alberto-Culver signed the agreements, it knew that *Wilko* made these agreements unenforceable. If that is the case, then Alberto-Culver, by not informing Mr. Scherk of that fact, defrauded him. This Court should not sanction that type of conduct.

Unless this Court decides to expand *Wilko* to international commercial transactions, the original Federal Arbitration Act, 9 U.S.C. Ch. 1, compels enforcement of the contracts.

CONCLUSION

Petitioner submits that Alberto-Culver has demonstrated no compelling reason to relieve it of its agreement to arbitrate. Alberto-Culver's position in this case is unenlightened and parochial. It asks this Court to adopt exactly the isolationist policy it condemned in *Zapata*. For its own immediate self-interest, Alberto-Culver urges a policy which is contrary to long-range American business interests.

Alberto-Culver strives to create the impression that enforcement of this arbitration provision will somehow leave it remedyless and will let some malefactor go scott free. While the Petitioner is confident that he will be vindicated in whatever forum this case is heard, Petitioner has never urged that he is free to perpetrate a fraud. He has never said that Alberto-Culver cannot pursue its claim against him. He does, however, assert that the only forum to hear the dispute is the International Chamber of Commerce in Paris.

Furthermore, it is incongruous that Alberto-Culver can hold Mr. Scherk to all of the warranties in the FLS and SEV contracts and at the same time refuse to comply with the arbitration commitments contained in those very agree-

ments. Alberto-Culver should not be allowed to renege on its obligations.

Dated: April 15, 1974.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHERK *v.* ALBERTO-CULVER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–781. Argued April 29, 1974—Decided June 17, 1974

Respondent, an American manufacturer based in Illinois, in order to expand its overseas operations, purchased from petitioner, a German citizen, three enterprises owned by him and organized under the laws of Germany and Liechtenstein, together with all trademark rights of these enterprises. The sales contract, which was negotiated in the United States, England, and Germany, signed in Austria, and closed in Switzerland, contained express warranties by petitioner that the trademarks were unencumbered and a clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that Illinois laws would govern the agreement and its interpretation and performance. Subsequently, after allegedly discovering that the trademarks were subject to substantial encumbrances, respondent offered to rescind the contract, but when petitioner refused, respondent brought suit in District Court for damages and other relief, contending that petitioner's fraudulent representations concerning the trademark rights violated § 10 (b) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder. Petitioner moved to dismiss the action or alternatively to stay the action pending arbitration, but the District Court denied the motion to dismiss and, as sought by respondent, preliminarily enjoined petitioner from proceeding with arbitration, holding, in reliance on *Wilko* v. *Swan*, 346 U. S. 427, that the arbitration clause was unenforceable. The Court of Appeals affirmed. *Held:* The arbitration clause is to be respected and enforced by federal courts in accord with the explicit provisions of the Arbitration Act of 1925, 9 U. S. C. § 1, that an arbitration agreement, such as is here involved, "shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. *Wilko* v. *Swan, supra*, distinguished. Pp. 4–13.

(a) Since uncertainty will almost inevitably exist with respect to any contract, such as the one in question here, with substantial contacts in two or more countries, each with its own substantive laws and conflict-of-laws rules, a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction. Such a provision obviates the danger that a contract dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. Pp. 8–9.

(b) In the context of an international contract, the advantages that a security buyer might possess in having a wide choice of American courts and venue in which to litigate his claims of violations of the securities laws, become chimerical, since an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the buyer's choice. P. 10.

(c) An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute, and the invalidation of the arbitration clause in this case would not only allow respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 9. P. 11.

484 F. 2d 611, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-781

Frits Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 17, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Frits Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June, 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February, 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered

ownership of these trademarks. In addition, the contract contained an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that "[t]he laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."[1]

The closing of the transaction took place in Geneva, Switzerland, in June 1969. Nearly one year later Alberto-Culver allegedly discovered that the trademark rights purchased under the contract were subject to substantial encumbrances that threatened to give others superior rights to the trademarks and to restrict or preclude Alberto-Culver's use of them. Alberto-Culver thereupon tendered back to Scherk the property that had been transferred to it and offered to rescind the contract. Upon Scherk's refusal, Alberto-Culver commenced this action for damages and other relief in a federal district

[1] The arbitration clause relating to the transfer of one of Scherk's business entities, similar to the clauses covering the other two, reads in its entirety as follows:

"The parties agree that if any controversy or claim shall arise out of the agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."

court in Illinois, contending that Scherk's fraudulent representations concerning the status of the trademark rights constituted violations of § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j, and Rule 10b–5 promulgated thereunder, 17 CFR §240.10b–5.

In response, Scherk filed a motion to dismiss the action for want of personal and subject matter jurisdiction as well as on the basis of forum non conviens, or, alternatively, to stay the action pending arbitration in Paris pursuant to the agreement of the parties. Alberto-Culver, in turn, opposed this motion and sought a preliminary injunction restraining the prosecution of arbitration proceedings.[2] On December 2, 1971, the District Court denied Scherk's motion to dismiss, and, on January 14, 1972, it granted a preliminary order enjoining Scherk from proceeding with arbitration. In taking these actions the Court relied entirely on this Court's decision in *Wilko* v. *Swan*, 346 U. S. 427, which held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of § 14 of that Act, barring "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . ." 15 U. S. C. § 77n.[3] The Court of Appeals for the Seventh Circuit, with one judge dissenting, affirmed, upon what it considered the controlling authority of the *Wilko* decision. 434 F. 2d 611. Because of the importance of the question presented we granted Scherk's petition for a writ of certiorari. — U. S. —.

[2] Scherk had taken steps to initiate arbitration in Paris in early 1971. He did not, however, file a formal request for arbitration with the International Chamber of Commerce until November 9, 1971, almost five months after the filing of Alberto-Culver's complaint in the Illinois federal court.

[3] The memorandum opinion of the District Court is unreported.

I

The Arbitration Act of 1925, 9 U. S. C. § 1 *et seq.*, reversing centuries of judicial hostility to arbitration agreements,[4] was designed to allow parties to avoid "the costliness and delays of litigation," and to place arbitration agreements "upon the same footing as other contracts . . . ." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); see also S. Rep. No. 556, 68th Cong., 1st Sess. (1924). Accordingly, the Act provides that an arbitration agreement such as is here involved "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.[5] The Act also provides in § 3 for a stay of proceedings in a case where a court is satisfied that the issue before it is arbitrable under the agreement, and § 4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a "failure, neglect, or refusal" of any party to honor an agreement to arbitrate.

In *Wilko* v. *Swan*, 346 U. S. 427, this Court acknowledged that the Act reflects a legislative recognition of

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[4] English courts traditionally considered irrevocable arbitration agreements as "ousting" the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act. See H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924); Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Prob. 580.

[5] Section 2 of the Arbitration Act renders "valid, irrevocable, and enforceable" written arbitration provisions "in any maritime transaction or a contract evidencing a transaction involving commerce . . . ," as those terms are defined in § 1. In *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, this Court held that the stay provisions of § 3 apply only to the two kinds of contracts specified in §§ 1 and 2. Since the transaction in this case constituted "commerce . . . with foreign nations," 9 U. S. C. § 1, the Act clearly covers this agreement.

the "desirability of arbitration as an alternative to the complications of litigation," *id.*, at 431, but nonetheless declined to apply the Act's provisions. That case involved an agreement between Anthony Wilko and Hayden, Stone & Co., a large brokerage firm, under which Wilko agreed to purchase on margin a number of shares of a corporation's common stock. Wilko alleged that his purchase of the stock was induced by false representations on the part of the defendant concerning the value of the shares, and he brought suit for damages under § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 77*l*. The defendant responded that Wilko had agreed to submit all controversies arising out of the purchase to arbitration, and that this agreement, contained in a written margin contract between the parties, should be given full effect under the Arbitration Act.

The Court found that "[t]wo policies, not easily reconcilable, [are] involved in this case." 346 U. S., at 438. On the one hand, the Arbitration Act stressed "the need for avoiding the delay and expense of litigation," *id.*, at 431, and directed that such agreements be "valid, irrevocable, and enforceable" in federal courts. On the other hand, the Securities Act of 1933 was "[d]esigned to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale," by creating "a special right to recover for misrepresentation . . . ." *Id.*, at 431 (footnote omitted). In particular, the Court noted that § 14 of the Securities Act, 15 U. S. C. § 77n, provides:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

The Court ruled that an agreement to arbitrate "is a

'stipulation,' and [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."* Thus, Wilko's advance agreement to arbitrate any disputes subsequently arising out of his contract to purchase the securities was unenforceable under the terms of § 14 of the Securities Act of 1933.

Alberto-Culver, relying on this precedent, contends that the District Court and Court of Appeals were correct in holding that its agreement to arbitrate disputes arising under the contract with Scherk is similarly unenforceable in view of its contentions that Scherk's conduct constituted violations of the Securities Exchange Act of 1934 and rules promulgated thereunder. For the reasons that follow, we reject this contention and hold that the provisions of the Arbitration Act cannot be ignored in this case.

At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12 (2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U. S., at

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*The arbitration agreement involved in Wilko was contained in a standard form margin contract. But see the dissenting opinion of Mr. Justice Frankfurter, 346 U. S., at 439, 440, concluding that the record did not show that "the plaintiff [Wilko] in opening an account had no choice but to accept the arbitration stipulation . . . ." The petitioner here would limit the decision in *Wilko* to situations where the parties exhibit a disparity of bargaining power, and contends that, since the negotiations leading to the present contract took place over a number of years and involved the participation on both sides of knowledgeable and sophisticated business and legal experts, the *Wilko* decision should not apply. See also the dissenting opinion of Judge Stevens of the Court of Appeals in this case, 484 F. 2d, at 615. Because of our disposition of this case on other grounds, we need not consider this contention.

431. There is no statutory counterpart of § 12 (2) in the Securities Exchange Act of 1934, and neither § 10 (b) of that Act nor Rule 10b–5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that § 10 (b) and Rule 10b–5 create an implied private cause of action, see 6 Loss, Securities 3869–3873 (1969) and cases cited therein; cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1963), the Act itself does not establish the "special right" that the Court in Wilko found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective acts,[7] certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act. In particular, the Court in Wilko noted that the jurisdictional provision of the 1933 Act, 15 U. S. C. § 77v, allowed a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." 346 U. S., at 431. The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have "exclusive jurisdiction,"

[7] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides as follows:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Section 29 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (a), provides:

"Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

While the two sections are not identical, the variations in their wording seem irrelevant to the issue presented in this case.

15 U. S. C. § 78aa, thus significantly restricting the plaintiff's choice of forum.[8]

Accepting the premise, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934, the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration pro-

[8] We do not reach, or imply any opinion as to the question whether the acquisition of Scherk's businesses was a security transaction within the meaning of § 10 (b) and Rule 10b-5 of the Securities Exchange Act of 1934. Although this important question was considered by the District Court and the Court of Appeals, and although the dissenting opinion, *post*, seems to consider it controlling, the petitioner did not assign the adverse ruling on the question as error and it was not briefed or argued in this Court.

vision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict of laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.[9]

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict of law rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[10]

[9] Together with its motion for a stay pending arbitration, Scherk moved that the complaint be dismissed because the federal securities laws do not apply to this international transaction, cf. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (CA2 1972). Since only the order granting the injunction was appealed, this contention was not considered by the Court of Appeals and is not before this Court.

[10] See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049, 1051 (1961). For example, while the arbitration agreement involved here provided that the controversies arising out of the agreement be resolved under "[t]he laws of the State of Illinois," *supra*, n. 1, a determination of the

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingnes and ability of businessmen to enter into international commercial agreements.[11]

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existence and extent of fraud concerning the trademarks would necessarily involve an understanding of foreign law on that subject.

[11] The dissenting opinion argues that our conclusion that *Wilko* is inapplicable to the situation presented in this case will vitiate the force of that decision because parties to transactions with many more direct contacts with this country than in the present case will nonetheless be able to invoke the "talisman" of having an "international contract." *Post*, at 8. Concededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply. Judicial response to such situations can and should await future litigation in concrete cases. This case, however, provides no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere. The only contacts between the United States and the transaction involved here is the fact that Alberto-Culver is an American corporation and the occurrence of some—but by no means the greater part—of the pre-contract negotiations in this country. To determine that "American standards of fairness," *post*, at 8,

The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case such as the one before us. In *Wilko* the Court reasoned that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him . . . ." 346 U. S., at 435. In the context of an international contract, however, these advantages become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice.[12]

Two Terms ago in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, we rejected the doctrine that a forum-selection clause of a contract, although voluntarily adopted by the parties, will not be respected in a suit brought in the United States "unless the selected state would provide a more convenient forum than the state in which suit is brought." *Id.*, at 7. Rather, we concluded that a "forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. We noted that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident

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must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.

[12] The dissenting opinion raises the specter that our holding today will leave American investors at the mercy of multinational corporations with "vast operations around the world . . . ." *Post*, at 12. Our decision, of course, has no bearing on the scope of the substantive provisions of the federal securities laws for the simple reason that the question is not presented in this case. See n. 8, *supra*.

might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.*, at 13–14.

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.[13] The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate his solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. *Id.*, at 9.[14]

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[13] Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, "[t]he laws of the State of Illinois" were explicitly made applicable by the arbitration agreement. See n. 1, *supra*.

[14] In *The Bremen* we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud . . . ." 407 U. S. 1, 12–13. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion. Compare *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395.

Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see n. 12, *infra*, in challenging the enforcement of whatever arbitral award is produced through arbitration. Article V (2)(b) of the

For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.[15]

Convention provides that a country may refuse recognition and enforcement of an award if "recognition or enforcement of the award would be contrary to the public policy of that country."

[15] Our conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision. On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the United States acceded to the treaty, [1970] 3 U. S. T. 2517, T. I. A. S. No. 6997, and Congress passed Chapter 2 of the United States Arbitration Act, 9 U. S. C. §§ 201 ff., in order to implement the Convention. Section 1 of the new chapter provides unequivocally that the Convention "shall be enforced in United States courts in accordance with this chapter."

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. E. 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961). Article II (1) of the Convention provides:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

In their discussion of this Article, the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be per-

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that court with directions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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mitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. See Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of United Nations Conference 24–28 (1958).

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

SUPREME COURT OF THE UNITED STATES

No. 73-781

Fritz Scherk, Petitioner,
v.
Alberto-Culver Company.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 17, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

Respondent (Alberto) is a publicly held corporation whose stock is traded on the New York Stock Exchange. Alberto, a Delaware Corporation, has its principal place of business in Illinois. Petitioner (Scherk) owned a business in Germany, FLS (Firma Ludwig Scherk), dealing with cosmetics and toiletries. Scherk owned various trade marks and all outstanding securities of a Liechtenstein corporation (SEV) and of a German corporation (Lodeva). Scherk owned various trade marks which were licensed to manufacturers and distributors in Europe and in this country. SEV collected the royalties on those licenses.

Alberto undertook to purchase from Scherk the entire establishment—the trade marks and the stock of the two corporations; and later, alleging it had been defrauded, brought this suit in the U. S. District Court in Illinois to rescind the agreement and to receive damages.

The only defense, material at this stage of the proceeding is a provision of the contract providing that if any controversy or claim arises under the agreement the parties agree it will be settled "exclusively" by arbitration under the rules of the International Chamber of Commerce, Paris, France.

The basic dispute between the parties concerned allegations that the trademarks which were basic assets in the transaction were encumbered and that their purchase was induced through serious instances of fraudulent representations and omissions by Scherk and his agents within the jurisdiction of the United States. If a question of trademarks were the only one involved the principle of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, would be controlling.

We have here, however, questions under the Securities Exchange Act of 1934 which in § 3 (a)(10) defines "security" as including any "note, stock, treasury stock, bonds, debenture, certificate of interest or participation in any profit-sharing agreement . . . ." 15 U. S. C. § 78c (a)(10). We held in *Tcherepnin* v. *Knight*, 389 U. S. 332, as respects § 3 (a)(10).

> ". . . [R]emedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities, and the definition of security in § 3 (a)(10) necessarily determines the classes of investments and investors which will receive the Act's protections. Finally, we are reminded that, in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Id.*, at 336. (Footnote omitted.)

Section 10 (b) of the 1934 Act makes it unlawful for any person by use of agencies of interstate commerce or the mails "to use or employ, in connection with the purchase or sale of any security," whether or not registered on a national securities exchange, "any manipulative or

deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U. S. C. § 78j (b).

Alberto, as noted, is not a private person but a corporation with publicly held stock listed on the New York Exchange. If it is to be believed, if in other words the allegations made are proven, the American company has been defrauded by the issuance of "securities" (promissory notes) for assets which are worthless or of a much lower value than represented. The Regulations of the Commission state:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 29 (a) of the Act provides:

> "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U. S. C. § 78cc (a).

And § 29 (b) adds that "every contract" made in vio-

lation of the Act "shall be void."[1] No exception is made for contracts which have an international character.

The 1933 Act, 48 Stat. 84, 15 U. S. C. § 77n had a like provision in its § 14:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

In *Wilko* v. *Swan*, 346 U. S. 427, a customer brought suit against a brokerage house alleging fraud in the sale of stock. A motion was made to stay the trial until an arbitration under the U. S. Arbitration Act, 9 U. S. C. § 3, as provided in the customer's contract. The Court held that an agreement for arbitration was a "stipulation" within the meaning of § 14 which sought to "waive" compliance with the Act. We accordingly held that the courts, not the arbitration tribunals, had jurisdiction over suits under the Act. The arbitration agency, we held, was bound by other standards which were not necessarily consistent with the 1933 Act. We said:

> "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly

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[1] Section 29 (b) reads: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation . . . ." 15 U. S. C. § 78cc (b).

assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review." *Id.*, at 437.

Wilko was held by the Court of Appeals to control this case—and properly so.

The Court does not consider the question whether a "security" is involved in this case, saying it was not raised by petitioner. A respondent, however, has the right to urge any argument to support the judgment in his favor (save possibly questions of venue, see *Peoria R. Co.* v. *United States*, 263 U. S. 528, 536; *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435–436 & 436 n. 11), even those not passed upon by the court below and also contentions rejected below. *Langnes* v. *Green*, 282 U. S. 531, 535–539; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 n. 5. The Court of Appeals held that "securities" within the meaning of the 1934 Act were involved here, 484 F. 2d 611, 615. The brief of the respondent is based on the premise that "securities" are involved here; and petitioner has not questioned that ruling of the Court of Appeals.

It could perhaps be argued that *Wilko* does not govern because it involved a little customer pitted against a big brokerage house, while we deal here with sophisticated buyers and sellers: Scherk, a powerful German operator, and Alberto, an American business surrounded and protected by lawyers and experts. But that would miss the point of the problem. The Act does not speak in terms of "sophisticated" as opposed to "unsophisticated" people dealing in securities. The Rules when the giants play are the same as when the pigmies enter the market.

If there are victims here, they are not Alberto the corporation, but the thousands of investors who are the security holders in Alberto-Culver Co. If there is fraud and the promissory notes are excessive, the impact is on the equity in Alberto-Culver Co.

Moreover, the securities market these days is not made up of a host of small people scrambling to get in and out of stocks or other securities. The markets are overshadowed by huge institutional traders.[2] The so-called "off-shore funds" of which Scherk is a member present perplexing problems under both the 1933 and 1934 Acts.[3] The tendency of American investors to invest indirectly as through mutual funds[4] may change the character of the regulation but not its need.

There has been much support for arbitration of disputes; and it may be the superior way of settling some disagreements. If A and B were quarreling over a trademark and there was an arbitration clause in the contract, the policy of Congress in implementing the United Nations Convention on the Recognition and Enforcement of Arbitral Awards as it did in 9 U. S. C. § 201 *et seq.*, would prevail. But the Act does not substitute an arbiter for the settlement of disputes under the 1933 and 1934 Acts. Art. II (3) of the Convention says:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[5] [1970] 3 U. S. T. 2519, T. I. A. S. No. 6997.

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[2] See Institutional Investor Study Report of the SEC, H. R. Doc. No. 92-64 (1971), particularly Vol. 4.

[3] *Id.*, p. XVI, p. 879 *et seq.*

[4] *Id.*, p. XIX, p. 215 *et seq.*

[5] The Convention also permits that arbitral awards not be recognized and enforced when a court in the country where enforcement is sought finds that "the recognition and enforcement of the

But § 29 (a) of the 1934 Act makes agreements to arbitrate liabilities under § 10 of the 1934 Act "void" and "inoperative." Congress has specified a precise way whereby big and small investors will be protected and the rules under which the Alberto-Culver Co.'s of this Nation shall operate. They or their lawyers cannot waive those statutory conditions, for our corporate giants are not principalities of power but guardians of a host of wards unable to care for themselves. It is these wards that the 1934 Act tries to protect.[6] Not a word in the convention gov-

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award would be contrary to the public policy of that country." Article V (2)(b). [1970] 3 U. S. T. 2520, T. I. A. S. No. 6997. It also provides that recognition of an award may be refused when the arbitration agreement "is not valid under the law to which the parties have subjected it," in this case the laws of Illinois. See n. 10, *infra*. Article V (1)(a). *Ibid.*

[6] Requirements promulgated under the 1934 Act require revelation to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, *inter alia*, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in outstanding securities, and even the importance to the business of trademarks held. See 17 CFR §§ 240.13a–1, 249.310; 3 CCH Fed. Sec. L Rep. ¶ 31,101 *et seq.* (Form 10–K). The Commission has proposed that corporations furnish a copy of annual reports filed with the SEC to any security holder who is solicited for a proxy and requests the report. 39 Fed. Reg. 3836. Current reports must be filed with the SEC by an issuer of securities when substantial events occur, as when the rights evidenced by any class of securities are materially altered by the issuance of another class of securities or when an issuer has acquired a significant amount of assets other than in the ordinary course of business. See 17 CFR §§ 240.13a–11, 249.308; 3 CCH Fed. Sec. L. Rep. ¶ 31,001 *et seq.* (Form 8–K).

The SEC, recognizing that the Form 10–K reports filed annually with the Commission might be excessively abstruse for security holders, see 39 Fed. Reg. 3835, has proposed that the annual reports distributed to security holders in connection with annual meetings and solicitation of proxies provide substantially greater amounts of meaningful information than required presently. These annual re-

erning awards adopts the standards which Congress has passed to protect the investors under the 1934 Act. It is peculiarly appropriate that we adhere to *Wilko*—more so even than when *Wilko* was adopted. Huge foreign investments are being made in our companies. It is important that American standards of fairness in security dealings govern the destinies of American investors until Congress changes these standards.

The Court finds it unnecessary to consider Scherk's argument that this case is distinguishable from *Wilko* in that *Wilko* involved parties of unequal bargaining strength. *Ante*, at 6 n. 6. Instead, the Court rests its conclusion on the fact that this was an "international" agreement, with an American corporation investing in the stock and property of foreign businesses, and speaks favorably of the certainty which inheres when parties specify an arbitral forum for resolution of differences in "any contract touching two or more countries."

This invocation of the "international contract" talisman might be applied to a situation where, for example, an interest in a foreign company or mutual fund was sold to an utterly unsophisticated American citizen, with material fraudulent misrepresentations made in this country. The arbitration clause could appear in the fine print of a form contract, and still be sufficient to preclude recourse to our courts, forcing the defrauded citizen to arbitration in Paris to vindicate his rights.[7]

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ports would include a description of the business of the issuer, a summary of operations, explanation of changes in revenues and expenses, information on the liquidity position and the working capital requirements of the issuer, and identification of management and performance on the market of the issuer's securities. See 39 Fed. Reg. 3834–3838.

[7] The Court concedes, *ante*, at 10 n. 11, that there may be situations where foreign contacts were "so insignificant or attenuated" that *Wilko* would apply and an American court would not enforce

It has been recognized that the 1934 Act, including the protections of Rule 10b–5, applies when foreign defendants have defrauded American investors, particularly when, as alleged here,[8] they have profited by virtue of proscribed conduct within our boundaries. This is true even when the defendant is organized under the laws of a foreign country, is conducting much of its activity outside the United States, and is therefore governed largely by foreign law.[9] The language of § 29 of the 1934 Act does not immunize such international trans-

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an arbitration agreement in an international contract. The recognition that "international" contracts may in fact involve significant direct contacts with this country is realistic and salutary. But the Court by its concession undermines somewhat its reliance on its admonition—itself supported only by speculation—that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensible precondition to achievement of the orderliness and predictability essential to any international business transaction." Uncertainty and a "dicey atmosphere," supposedly destructive of international contracts, may persist for many contracts. The parties to an international contract may not in fact be bound by a "solemn agreement" to arbitrate, for an American court could find, at a much later date, sufficient contacts with this country to require the application of *Wilko*.

[8] The District Court for the Northern District of Illinois noted allegations that Scherk had failed to state a material fact the omission of which would have been misleading, see 17 CFR § 240.10b–5 (2), during crucial negotiations in Melrose Park, Illinois, and that communications between Alberto and Scherk's attorney concerning the validity and value of the trademarks occurred within the territorial jurisdiction of the United States. Finally, the District Court noted that the full economic impact of the alleged fraud occurred within the United States.

[9] See, *e. g.*, *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F. 2d 1326, 1334–1339 (CA2 1972); *Travis* v. *Anthes Imperial Ltd.*, 473 F. 2d 515, 523–528 (CA8 1973); *SEC* v. *United Financial Group, Inc.*, 474 F. 2d 354 (CA9 1973); *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200 (CA2 1968); *Roth* v. *Fund of Funds*, 279 F. Supp. 935, aff'd, 405 F. 2d 421 (CA2 1968).

actions, and the United Nations Convention provides that a forum court in which a suit is brought need not enforce an agreement to arbitrate which is "void" and "inoperative" as contrary to its public policy.[10] When a

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[10] A summary of the conference proceedings which led to the adoption of the United Nations Convention was prepared by G. W. Haight, who served as a member of the International Chamber of Commerce delegation to the conference. G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Sumary Analysis of Record of United Nations Conference, May/June 1958 (1958).

When Art. II (3) was being discussed, the Israeli delegate pointed out that while a court could, under the draft Convention as it then stood, refuse enforcement of an *award* which was incompatible with public policy, " 'the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy.' " *Id.*, at 27. The German delegate observed that this difficulty arose from the omission in Art. II (3) " 'of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the convention.' " *Ibid.*

Haight continues:

"When the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention. Nor was this omission corrected in the Report of the Drafting Committee (L.61), *although the obligation to refer parties to arbitration was (and still is) qualified by the clause 'unless it finds that the agreement is null and void, inoperative or incapable of being performed.'*

"As the applicable law is not indicated, courts may under this wording be allowed some latitude; *they may find an agreement incapable of performance if it offends the law or the public policy of the forum.* Apart from this limited opening, the Conference appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements." *Id.*, at 28 (emphasis added).

Whatever "concern" the delegates had that signatories to the Convention "not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability," *ante*, at 13–14 n. 15, it would seem that they contemplated that a court may

foreign corporation undertakes fraudulent action which subjects it to the jurisdiction of our federal securities laws, nothing justifies the conclusion that only a diluted version of those laws protect American investors.

Section 29 (a) of the Act provides that a stipulation binding one to waive compliance with "any provision" of the 1934 Act shall be void, and the 1934 Act expressly provides that the federal district courts shall have "exclusive jurisdiction" over suits brought under the Act. 15 U. S. C. § 78aa. The Court appears to attach some significance to the fact that the specific provisions of the 1933 Act involved in *Wilko* are not duplicated in the 1934 Act, which is involved in this case. While Alberto would not have the right to sue in either a state or federal forum as did the plaintiff in *Wilko*, 346 U. S., at 431, the Court deprives it of its right to have its 10b–5 claim heard in a federal court. We spoke at length in *Wilko* of this problem, elucidating the undesirable effects of remitting a securities plaintiff to an arbitral, rather than a judicial, forum. Here, as in *Wilko*, the allegations of fraudulent misrepresentation will involve "subjective findings on the purpose and knowledge" of the defendant,

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decline to enforce an agreement which offends its law or public policy.

The Court also attempts to treat this case as only a minor variation of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1. In that case, however, the Court, per BURGER, C. J., explicitly stated that: "A contractual choice-of-forum clause should be held unenforceable if the enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.*, at 15.

That is inescapably the case here, as § 29 of the Securities Exchange Act and *Wilko* v. *Swan* make clear. Neither § 29, nor the Convention on international arbitration, nor *The Bremen* justifies abandonment of a national public policy that securities claims be heard by a judicial forum simply because some international elements are involved in a contract.

questions ill determined by arbitrators without judicial instruction on the law. See *id.*, at 435–436. An arbitral award can be made without explication of reasons and with development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law. We recognized in *Wilko* that there is no judicial review corresponding to review of court decisions. *Id.*, at 436–437. The extensive pretrial discovery provided by the Federal Rules of Civil Procedure for actions in District Court would not be available. And the wide choice of venue provided by the 1934 Act, 15 U. S. C. § 78aa, would be forfeited. See *Wilko* v. *Swan*, 346 U. S., at 431, 435. The loss of the proper judicial forum carries with it the loss of substantial rights.[11]

When a defendant, as alleged here, has through proscribed acts within our territory brought itself within the ken of federal securities regulation, a fact not disputed here, those laws—including the controlling principles of *Wilko*—apply whether the defendant is foreign or American, and whether or not there are transnational elements in the dealings. Those laws are rendered a chimera when foreign corporations or funds—unlike domestic defendants—can nullify them by virtue of arbitration clauses which send defrauded American inves-

[11] The agreements in this case provided that the "laws of the State of Illinois" are applicable. Even if the arbitration court should read this clause to require application of Rule 10b–5's standards, Alberto's victory would be Pyrrhic. The arbitral court may improperly interpret the substantive protections of the Rule, and if it does its error will not be reviewable as would the error of a federal court. And the ability of Alberto to prosecute its claim would be eviscerated by lack of discovery. These are the policy considerations which underlay *Wilko* and which apply to the instant case as well.

tors to the uncertainty of arbitration on foreign soil, or, if those investors cannot afford to arbitrate their claims in a far-off forum, to no remedy at all.

Moreover, the international aura which the Court gives this case is ominous. We now have many multi-national corporations in vast operations around the world—Europe, Latin America, the Middle East, and Asia.[12] The investments of many American investors turn on dealings by these companies. Up to this day, it has been assumed by reason of *Wilko* that they were all protected by our various federal securities Acts. If these guarantees are to be removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception.

The virtue of certainty in international agreements may be important, but Congress has dictated that when there are sufficient contacts for our securities laws to apply, the policies expressed in those laws take precedence. Section 29, which renders arbitration clauses void and inoperative, recognizes no exception for fraudulent dealings which incidentally have some international factors. The Convention makes provision for such national public policy in Art. II (3). Federal jurisdiction under the 1934 Act will attach only to some international transactions, but when it does, the protections afforded investors such as Alberto can only be full-fledged.

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[12] See Knickerbocker, Oligopolistic Reaction and Multinational Enterprise (Haw. Univ. 1973); J. Vaupel & J. Curhan, The World's Multinational Enterprises (Harvard Univ. 1973). See generally Senate Committee on Finance, 93d Cong., 1st Sess., Implications of Multinational Firms for World Trade and Investment and for U. S. Trade and Labor (Comm. Print 1973); Morgan, Controlling the Multinationals, Wash. Post, Nov. 17, 1973, at A15; Diebold, Precarious Path of the Multinationals, Wall Street J., Aug. 17, 1973, at 6, col. 4.

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In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF RESPONDENT FOR REHEARING OF DECISION

Respondent, Alberto-Culver Company, respectfully requests the Court to reconsider its decision. It is Respondent's conviction that the Court may not have envisioned or intended the far-reaching effects which this decision will have in depriving American investors of the protections conferred by the securities laws of this country.

The majority opinion holds that the "anti-waiver" provision contained in section 29(a) of the Securities Ex-

change Act of 1934 ("1934 Act"), 15 U.S.C. §78cc(a), which declares "void" "any" attempted waiver of "any provision" of the 1934 Act, does not apply to "international" transactions. Similar "anti-waiver" provisions are found in the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940.

Accordingly, unless modified, the majority opinion will be regarded as pronouncing a rule that in "international" securities transactions an American investor, who is the victim of securities fraud committed by a foreigner in this country, is required to arbitrate and is denied the statutorily conferred right to have the securities violations adjudicated in the courts of the United States. The two-fold effect of the decision is to permit foreigners to avoid the application of our securities laws, *even as to securities fraud committed in this country,* by simply "specifying in advance" for either (1) arbitration before a remote tribunal or (2) the application of foreign substantive law.

I

ALTHOUGH THE OPINION OMITS ANY MENTION THAT THE SECURITIES FRAUD HERE OCCURRED IN THE UNITED STATES, SUCH UNDISPUTED FACT IS REFERRED TO IN THE DISSENTING OPINION AND BY THE COURTS BELOW. THEREFORE THE EFFECT OF THE MAJORITY OPINION IS TO ARM FOREIGNERS CONTEMPLATING SECURITIES FRAUD IN THE UNITED STATES WITH THE MEANS OF EVADING THE PROTECTION GIVEN AMERICAN INVESTORS BY THE SECURITIES LAWS

The applicable statute in this case, section 29(a) of the 1934 Act, as well as the other aforementioned Acts de-

signed to protect the American investor, declare as "void" any attempt to waive any provision of the Act, and section 29(a) in no way differentiates arbitration clauses in domestic from those in international transactions. Nowhere does the majority opinion attempt to explain how its "international" exception can be squared with the unqualified language of section 29(a).

Nor does the majority opinion make any reference to the critical fact that the violations of the securities laws, which constitute the basis of Alberto's action to rescind, occurred within the boundaries of the United States. This was so found by the lower courts, is referred to in the dissent, and is unchallenged in the context of the proceedings before this Court.

The inescapable effect of the majority opinion will be to deprive the American investing public of vital protections conferred by the securities laws against violations within the United States. For example, a foreign broker selling foreign securities in this country or a foreign mutual fund or other foreign issuer selling its shares in this country may, by inserting an arbitration clause in the applicable contract, ignore or violate the registration and disclosure provisions of the Securities Act of 1933, the 1934 Act, and the Investment Company Act of 1940. The sole remedy of the American investing public would be to arbitrate, probably at a remote location and in any event in a tribunal which almost certainly will lack the expertise, discovery and other procedural mechanisms, or perhaps even the inclination for proper enforcement of the American securities laws. The opinion's rationale would enable a foreign investment adviser to enter this country and without registering to furnish fraudulent investment advice concerning foreign securities to American citizens in violation of the Investment Advisers Act

of 1940, and yet evade being held to account before the United States courts simply by providing for foreign arbitration in the documents creating his relationship with the American citizen.

The dissenting opinion correctly reasons that, in these times when foreigners are so active in American securities transactions, "[i]t is peculiarly appropriate that we adhere to *Wilko*—more so even than when *Wilko* was adopted". (Dissent, p. 8)[1] The majority opinion necessarily will prompt foreign nationals to use arbitration clauses in their securities dealings with American investors, *sophisticated and unsophisticated,* as a means of frustrating enforcement of the American securities laws by the tribunals most experienced and interested in enforcing them. We find it difficult to believe that the Court intended this result, and yet it most definitely follows from the majority decision.

These dangers are compounded by the Court's very broad definition of "international transaction" which appears to encompass "any contract touching two or more countries". (Slip Opinion, p. 9, and Dissent, p. 8) The only reservation suggested by the Court seems to be "where the contacts with *foreign* countries are so insignificant or attentuated . . ." (Slip Opinion, p. 10, note 11), regardless of how *significant* was the conduct *in the United States* constituting the securities fraud. By this approach the Court reverses established concepts as to what justifies jurisdiction over foreigners.[2]

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[1] *Wilko* v. *Swan,* 346 U.S. 427 (1953).

[2] See cases cited at footnote 3 of this Petition for Rehearing.

II

THE HAZARD TO THE AMERICAN INVESTING PUBLIC WHICH FLOWS FROM THE MAJORITY OPINION TRANSCENDS ANY CONJECTURAL BENEFIT TO INTERNATIONAL COMMERCE.

The crux of the Court's justification for departing from *Wilko* in international transactions is based on the hypothesis that not to enforce an arbitration provision in an "international" agreement will ". . . surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements". (Slip Opinion, p. 10)

Is the majority hypothesis, that *legitimate* international commerce will suffer if securities fraud committed in this country is required to be adjudicated in the federal courts of this country, as realistic or pragmatic as the dissent's hypothesis that upholding arbitration of such fraud will aid, abet and encourage foreigners to violate our securities laws?

Concern for *legitimate* foreign business interests does not require the encouragement of those bent on committing securities fraud. This case poses the principle that where securities fraud is deliberately and knowingly committed by a foreigner within this country, *such fraud* (of which only the defrauding party was aware at the time the arbitration clause was adopted) should be tried before the American courts as is contemplated by the express provisions of our securities laws. Such a holding should in no way imperil legitimate international business or the use of legitimate arbitration provisions.

The dissent notes that the conclusion that foreign commerce will suffer is "supported only by speculation . . ." (Dissent, p. 9, note 7)

On the other hand, the concern that foreigners will use stipulations to arbitrate to evade proper enforcement of securities laws is reasonable and realistic. We have witnessed, and undoubtedly will continue to experience, massive securities frauds committed by foreigners against American citizens involving foreign securities.[3] The necessary consequences of the majority opinion will be to encourage such conduct by those who count on the lesser likelihood of being held to account in arbitral proceedings.

The opinion stresses the importance of "certainty" in international transactions. However, the Court's decision does not assure such certainty, since both the majority and the dissent recognize that at a later date a court might refuse to enforce a foreign arbitral award. (See Slip Opinion, pp. 12-13, note 14, and Dissent, p. 9, note 7) Moreover, the agreement between Alberto and Scherk did in fact provide certainty of forum and of applicable law. The forum selected was arbitration, except for violations of the American securities laws which, under *Wilko* and section 29(a) of the 1934 Act, had to be adjudicated. By specifying Illinois law, the parties incorporated the American securities laws as being applicable to their transaction and thereby expressly adopted "American standards of fairness". (Slip Opinion, p. 10, note 11) The certainty thereby resulting is not dissimilar to the certainty achieved under the majority view, and it is achieved with

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[3] See e.g., *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1334-1339 (CA2 1972); *Travis* v. *Anthes Imperial Ltd.* 473 F.2d 515, 523-528 (CA8 1973); *SEC* v. *United Financial Group, Inc.*, 474 F.2d 354 (CA9 1973); *Schoenbaum* v. *Firstbrook* 405 F.2d 200 (CA2 1968); *Roth* v. *Fund of Funds*, 279 F.Supp. 935, aff'd; 405 F.2d 421 (CA2 1968).

out doing violence to the well-established statutory and judicial framework.

The American securities laws provide unique protections for the American investor which find no counterpart elsewhere in the world, and which in many respects are contrary to prevalent European notions.[4] To hold that this extraordinary and unique legal system, developed in the United States, should be enforced by the courts of and within the United States ought not to be construed as demeaning the standards of justice elsewhere in the world.

III

THE OPINION RAISES ISSUES AND LEAVES THEM UNDECIDED THEREBY IMPLYING THAT THIS COURT MAY WELL ENTERTAIN OTHER DEPARTURES FROM WELL-SETTLED SECURITIES PRECEDENTS.

Other features of the majority opinion should concern this Court and others entrusted with the proper enforcement of the securities laws.

The Court's discussion of the differences between the 1933 Act and the 1934 Act (Slip Opinion, pp. 6-8) implies that the Court might approve a decision whereby the *Wilko* doctrine is held totally inapplicable under the 1934 Act in domestic transactions as well as international. The Court has further suggested that *Wilko* might not apply to parties of equal bargaining power. (Slip Opinion, p. 6, note 6) The Court also questions whether Alberto's purchase of stock and issuance of promissory notes is a securities transaction within the coverage of the Act (See Slip

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[4] *Internationalization of Securities Markets,* The Business Lawyer, Vol. 29, March, 1974, 107, 109.

Opinion, p. 8, note 8), thus inviting a narrowing of the definition of what constitutes a security even though that subject was never raised or briefed before this Court.

IV

THE OPINION SUGGESTS THAT INTERNATIONAL TRANSACTIONS ARE NOT SUBJECT TO THE SUBSTANTIVE PROVISIONS OF THE SECURITIES LAWS AND THAT THE APPLICATION OF THESE SUBSTANTIVE PROVISIONS CAN BE AVOIDED SIMPLY BY DESIGNATING THE APPLICABLE LAW TO BE THAT OF A FOREIGN COUNTRY.

Of even greater concern to proper enforcement of the securities laws is the effect of the majority opinion on the substantive provisions of the securities laws even though the Court notes that the "decision has no bearing on the scope of the substantive provisions . . ." (Slip Opinion, p. 11, note 12) [5]

It is inescapable that the "international" exception which the Court pronounces will ignite consideration by

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[5] The attempt by the Court to differentiate between the substantive and procedural provisions of the 1934 Act is not only contrary to the language of section 29(a) of the Act, but also is a radical departure from *Wilko* (where this contention was argued and rejected), and from *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1955) where this Court, at page 203 of the opinion, recognized that the procedure is an inseparable component of the substantive rights:

> "For the remedy by arbitration, whatever its merits or shortcomings, *substantially affects* the cause of action created by the state. *The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result . . .*" (Emphasis supplied)

lower courts as to whether this exception also applies to the substantive provisions, since it follows logically that international transactions exempted from some should similarly be exempted from other provisions of the securities laws. The text of the majority opinion directly suggests that there is "considerable uncertainty" whether any part of the federal securities laws apply to an international transaction. (See Slip Opinion, p. 9, and in particular note 9 and the portion of the opinion to which note 9 relates) Accordingly, notwithstanding the Court's disclaimer, the language and thrust of the opinion will necessarily encourage the review and possible overturn, and will promote uncertainty as to the status, of recent leading decisions which have held that foreign nationals who commit securities violations within this country are subject to American securities laws where jurisdictional requirements are satisfied.[6]

There is no reason to believe that foreigners and their counsel will leave these matters to the vicissitudes of case-by-case adjudication. The majority opinion advises them as to a method of achieving "certainty" of result. The opinion will activate a foreigner contemplating securities fraud in a securities transaction "touching two or more countries", but occurring in material part in the United States, to avoid both the substantive provisions of our securities laws and accountability in the United States courts simply by "specifying in advance . . . the law to be applied" as that of a foreign country. (Slip Opinion, p. 9) Indeed, the reasoning of the opinion would support a clause expressly *excluding* the applicability of the securities laws in international transactions. The "certainty" thereby achieved is the certainty that our laws can be circumvented with impunity.

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[6] See cases cited at footnote 3 of this Petition for Rehearing.

V

CONCLUSION

The substantive and procedural protections to American investors under the securities laws, painstakingly evolved both judicially and statutorily during the past four decades, are seriously eroded, impaired and left uncertain by this decision to an extent which we believe may be far beyond what the Court foresaw or intended. It should be of particular concern and apprehension both to the Court and to those most intimately entrusted with the day-by-day workings of the securities regulatory system, that the opinion raises and then leaves hanging several vital issues, thereby implying that in any international securities transaction and in some domestic transactions the Court may be amenable to further erosions of the protections provided by the statutory and regulatory scheme.

The opinion may not have taken cognizance of its effect on many judicial decisions, including a very recent decision of this Court, declaring other legal areas as non-arbitrable, *e.g.*, anti-trust, patent, and racial discrimination.[7] Under the rationale of the opinion, a party should likewise be denied access to our courts in these other areas if there is a stipulation to arbitrate and if the transaction is "international".

We respectfully petition the Court to grant rehearing of this case, to reconsider its decision, and to affirm the judgment of the courts below. Before finally concluding, it may be helpful to the Court to elicit the views of the

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[7] See Respondent's Brief, page 18.

Securities and Exchange Commission with respect to the effect of the decision on the enforcement of our securities regulatory system.

Dated: July 12, 1974

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Francis J. Higgins certifies that he is one of the attorneys of record for Respondent Alberto-Culver Company and that the foregoing Petition for Rehearing is presented in good faith and not for delay.

(s) FRANCIS J. HIGGINS